DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 85-54-CFX
Status: GRANTED

Docketed:
July 12, 1985

See also:
85-5U

Title: Library of Congress, et al., Petitioners
v.
Tommy Shaw

Court: United States Court of Appeals for the District of Columbia Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Ralston, Charles Stephen

Entry	Date	Note	Proceedings and Orders
1	May 3 1985		Application for extension of time to file petition and order granting same until June 27, 1985 (Chief Justice, May 8, 1985).
2	Jun 17 1985		Application for further extension of time to file petition and order granting same until July 12, 1985 (Chief Justice, June 21, 1985).
3	Jul 12 1985	G	Petition for writ of certiorari filed.
4	Aug 14 1985		DISTRIBUTED. September 30, 1985
5	Aug 15 1985	X	Brief of respondent Tommy Shaw in opposition filed.
6	Sep 17 1985	X	Reply brief of petitioners Library of Congress, et al. filed.
7	Oct 7 1985		Petition GRANTED.
			**********
8	Nov 7 1985	G	Motion of the Solicitor General to dispense with printing the joint appendix filed.
9	Nov 18 1985		Motion of the Solicitor General to dispense with printing the joint appendix GRANTED.
10	Nov 18 1985		Record filed.
11	Nov 18 1985		Certified copy of partial proceedings received.
12	Nov 26 1985		Brief of petitioners Library of Congress, et al. filed.
13	Dec 2 1985		Record filed.
15	Dec 12 1985		Order extending time to file brief of respondent on the merits until January 3, 1986.
16	Jan 3 1986		Brief of respondent Tommy Shaw filed.
17	Jan 7 1986		SET FOR ARGUMENT, Monday, February 24, 1986. (2nd case)
18	Jan 7 1986		CIRCULATED.
19	Feb 14 1986	X	Reply brief of petitioners Library of Congress, et al. filed.
20	Feb 24 1986		ARGUED.

PETITION FOR WRIT OF CERTIORARI

85-54

No.

In the Supreme Court of the United States

OCTOBER TERM, 1985

LIBRARY OF CONGRESS, ET AL., PETITIONERS

v.

TOMMY SHAW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

WILLIAM KANTER
AL J. DANIEL, JR.
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), which makes the United States liable for attorneys' fees "the same as a private person," waives the federal government's sovereign immunity so as to permit the recovery of interest on attorneys' fee awards against the United States.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, petitioners include Daniel J. Boorstin, Librarian of Congress; Donald C. Curran, Associate Librarian of Congress; and John J. Kominsky, General Counsel, Library of Congress.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statute involved	2
Statement	2
Reasons for granting the petition	6
Conclusion	17
Appendix A	1a
Appendix B	57a
Appendix C	70a
Appendix D	71a
Appendix E	73a
Appendix F	74a

TABLE OF AUTHORITIES

Cases:

Albrecht v. *United States*, 329 U.S. 599	9, 14
Arvin v. *United States*, 742 F.2d 1301	12, 16
Blake v. *Califano*, 626 F.2d 891	8, 10, 12, 15
Boston Sand Co. v. *United States*, 278 U.S. 41	10, 11
Canadian Aviator, Ltd. v. *United States*, 324 U.S. 215	11
Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412	12
Copeland v. *Marshall*, 641 F.2d 880	3, 17
Copper Liquor, Inc. v. *Adolph Coors Co.*, 701 F.2d 542	14
Cross v. *United States Postal Service*, 733 F.2d 1327, aff'd, 733 F.2d 1332, cert. denied, No. 84-979 (Mar. 18, 1985)	15
deWeever v. *United States*, 618 F.2d 685	15
Fischer v. *Adams*, 572 F.2d 406	15
General Motors Corp. v. *Devex Corp.*, 461 U.S. 648	13

Cases—Continued: Page

Holly v. *Chasen*, 639 F.2d 795, cert. denied, 454 U.S. 822 ..... 9, 10, 12
Indian Towing Co. v. *United States*, 350 U.S. 61 11
Knights of the Ku Klux Klan v. *East Baton Rouge Parish School Board*, 735 F.2d 895 ..... 14-15, 16
Lehman v. *Nakshian*, 453 U.S. 156 ..... 8, 10, 13-14
Marziliano v. *Heckler*, 728 F.2d 151 15
McMahon v. *United States*, 342 U.S. 25 ..... 7, 8
Murray v. *Weinberger*, 741 F.2d 1423 6
Perkins v. *Standard Oil Co. of California*, 487 F.2d 672 14
Richerson v. *Jones*, 551 F.2d 918 .....
Rodgers v. *United States*, 332 U.S. 371 13
Ruckelshaus v. *Sierra Club*, 463 U.S. 680 ..... 8, 14
Saunders v. *Claytor*, 629 F.2d 596, cert. denied, 450 U.S. 980 15
Segar v. *Smith*, 738 F.2d 1249, cert. denied, No. 84-1200 (May 20, 1985) 12, 15
Smyth v. *United States*, 302 U.S. 329 9
Soriano v. *United States*, 352 U.S. 270 8
Standard Oil Co. v. *United States*, 267 U.S. 76 11
Tillson v. *United States*, 100 U.S. 43 11
United States v. *Alcea Band of Tillamooks*, 341 U.S. 48 ..... 8, 9, 11
United States v. *Goltra*, 312 U.S. 203 ..... 9, 10, 11
United States v. *King*, 395 U.S. 1 10
United States v. *Louisiana*, 446 U.S. 253 ..... 9, 10
United States v. *Mescalero Apache Tribe*, 518 F.2d 1309, cert. denied, 425 U.S. 911 8
United States v. *North American Transp. & Trading Co.*, 253 U.S. 330 ..... 8, 10
United States v. *North Carolina*, 136 U.S. 211 10
United States v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 ..... 9, 10
United States v. *Sherman*, 98 U.S. 565 10
United States v. *Sherwood*, 312 U.S. 584 8
United States v. *Testan*, 424 U.S. 392 8
United States v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 ..... 9, 10
United States v. *Verdier*, 164 U.S. 213 10
United States v. *Worley*, 281 U.S. 339 ..... 9-10, 11

Cases—Continued: Page

United States v. *Yellow Cab Co.*, 340 U.S. 543 11
United States ex rel. Angarica v. *Bayard*, 127 U.S. 251 9

Statutes:

Civil Rights Act of 1964, Pub. L. No. 88-352, § 706(k), 78 Stat. 261 12
Equal Access to Justice Act, Pub. L. No. 96-481, 94 Stat. 2325 *et seq.*:
§ 203(c), 94 Stat. 2327 14
§ 204(c), 94 Stat. 2329 14
Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103, 42 U.S.C. 2000e *et seq.* 12
42 U.S.C. 2000e-5(k) 1, 3, 4, 5, 7, 8, 12, 13, 14, 16
War Risk Insurance Act of 1914, ch. 293, 38 Stat. 711 *et seq.* 11
5 U.S.C. 504 14
15 U.S.C. 15 14
26 U.S.C. 7426(g) 13
28 U.S.C. 1961(c)(2) 13
28 U.S.C. 2411 13
28 U.S.C. 2412 15
28 U.S.C. 2412(b) 14, 15
28 U.S.C. 2412(d) 14
28 U.S.C. 2412(d)(1)(A) 15
28 U.S.C. 2516(a) 10, 13
28 U.S.C. 2516(b) 13
29 U.S.C. 633a 14
31 U.S.C. 1304(b)(1)(A) 13
31 U.S.C. 1304(b)(1)(B) 13
31 U.S.C. 3728(c) 13
40 U.S.C. 258a 13

Miscellaneous:

H.R. 2378, 99th Cong., 1st Sess. (1985) 15
H.R. Rep. 92-899, 92d Cong., 2d Sess. (1972) 12
H.R. Rep. 92-238, 92d Cong., 1st Sess. (1971) 12
H.R. Rep. 99-120, 99th Cong., 1st Sess. (1985) 15
S. Rep. 92-415, 92d Cong., 1st Sess. (1971) 12
S. Rep. 92-681, 92d Cong., 2d Sess. (1972) 12

In the Supreme Court of the United States

OCTOBER TERM, 1985

No.

LIBRARY OF CONGRESS, ET AL., PETITIONERS

v.

TOMMY SHAW

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The Solicitor General, on behalf of the Library of Congress, et al., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-56a) is reported at 747 F.2d 1469. The opinion and judgment of the district court (App., *infra*, 57a-70a) are unreported.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 71a-72a) was entered on November 6, 1984; an order denying rehearing (App., *infra*, 73a-75a) was en-

tered on February 20, 1985. On May 8, 1985, the Chief Justice extended the time within which to file a petition for a writ of certiorari to June 27, 1985. On June 21, 1985, the Chief Justice further extended the time for filing the petition to July 12, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

42 U.S.C. 2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

STATEMENT

1. In 1976 and 1977 respondent filed administrative complaints charging his employer, the Library of Congress (Library), with racial discrimination. These complaints were settled in August 1978, when the Library agreed to award respondent back pay and to take certain other remedial measures. App., *infra*, 2a-3a. Shortly afterwards, however, after consultation with the Comptroller General, the Library informed respondent that it lacked the authority to provide such relief absent a specific finding of racial discrimination (App., *infra*, 3a & n.7). Respondent then brought suit, arguing that Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 (Title VII), 42 U.S.C. 2000e *et seq.*, authorized the Library to afford the relief specified in the settlement agreement (App., *infra*, 3a-4a).

On September 14, 1979, the United States District Court for the District of Columbia ruled in respondent's favor on the merits (see App., *infra*, 4a). The court accordingly held (see *ibid.*) that respondent's attorney [1] was entitled to an award of fees under the Title VII attorneys' fees provision, which states that "the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs, and * * * the United States shall be liable for costs the same as a private person." 42 U.S.C. 2000e-5(k). But the district court declined to set the fee award pending a decision by the en banc District of Columbia Circuit in *Copeland* v. *Marshall*, 641 F.2d 880 (1980), which the district court anticipated would provide guidance on the standards applicable in the computation of attorneys' fees. See App., *infra*, 4a, 60a. The court of appeals' decision in *Copeland* ultimately issued almost one year later, on September 2, 1980.

Over one additional year passed before the district court, on November 4, 1981, issued an order setting fees and awarding them to respondent's attorney. The court began by fixing the so-called "lodestar" (see App., *infra*, 2a n.2) based on the number of hours worked and the attorney's 1978 hourly rate (*id.* at 5a, 62a-66a). After making a variety of adjustments to the lodestar that are not relevant here (see *id.* at 5a, 66a-68a), the district court declared that "[t]his

---

[1] The attorney whose fee is at issue here, Shalon Ralph, represented respondent in 1978, while the case was in its administrative phase; he also provided some assistance during the district court proceedings (App., *infra*, 4a n.13). The fee claims of respondent's other counsel have been settled (*ibid.*). References to "respondent's attorney" in this petition therefore are directed only at Ralph.

case should have ended in August 1978, or at the latest in November of that year. If [respondent's attorney] had been compensated at about that time, he could have invested the money at an average yield of not less than 10% per year. It is the fault of neither [respondent] nor [his attorney] that payment was not made sooner." *Id.* at 68a (footnote omitted). Because three years had passed since late 1978, the court accordingly ordered "an upward adjustment [of the fee] of 30% for delay" (*ibid.*).

2. On appeal, a divided panel of the court of appeals rejected the Library's contention that the 30% delay adjustment was improper because Congress in Section 2000e-5(k) had not authorized the award of interest against the United States. The panel majority acknowledged that the delay adjustment was interest because it "was designed to reimburse [respondent's] counsel for the decrease in value of his uncollected legal fee between the date on which he concluded his legal services and the court's estimated date of likely actual receipt" (App., *infra*, 11a (footnote omitted); see *id.* at 12a-13a & n.41). And the court acknowledged the force of the so-called "no-interest rule"—that the United States may not be held liable for interest in the absence of an express waiver of its sovereign immunity (*id.* at 13a).

The court of appeals held, however, that Section 2000e-5(k) is such a waiver. The court noted that private parties generally may be held liable for interest on fee awards under Title VII, and that Title VII makes the United States liable for costs " 'the same as a private person.' ". This, the court concluded, is an "express" statutory waiver as to interest, the range of which "is defined in unmistakable language." App., *infra*, 15a. The court also based its holding on

an alternative ground: that "the traditional rigor of the sovereign-immunity doctrine [is relaxed] when a statute measures the liability of the United States by that of private persons" (*id.* at 24a).[2]

Judge Ginsburg dissented. She agreed that the 30% adjustment is interest, but concluded that nothing in either Section 2000e-5(k) or its legislative history so much as adverts to an intent to overcome the "no-interest rule" (App., *infra*, 41a). Judge Ginsburg also noted that sovereign immunity prevents Title VII *plaintiffs* from recovering interest on back pay awards entered against the government, and found it unlikely that Congress would have given Title VII attorneys more favorable treatment than

---

[2] Although the court of appeals thus held that attorneys may be awarded interest under Section 2000e-5(k), it nonetheless remanded the case to the district court for further proceedings. In the majority's view, "a delay-in-payment adjustment [is] appropriate only where the lodestar is the per-hour charge to clients who pay when billed" (App., *infra*, 8a n.28). The court suggested, however, that a lodestar may "represent[] a higher rate charged clients who sue under fee-shifting statutes," in which case the figure might already "ha[ve] taken into account the pecuniary disadvantage resulting from the lengthy wait for payment ordinarily encountered under such statutes" (*ibid.*). In such circumstances, the panel concluded, "an upward adjustment for delay would * * * result in the attorney being paid twice for the delay" (*ibid.*). The court of appeals therefore instructed the district court, on remand, to determine whether the lodestar had been based on a rate that "has already taken into account the pecuniary disadvantage resulting from the lengthy wait for payment" (*id.* at 37a). If so, the district court was to vacate its 30% delay adjustment (*ibid.*). The court of appeals also noted that, following oral argument in the case, it had ordered the government to pay the undisputed portion of the attorney's fee (App., *infra*, 6a n.24); that payment has since been made.

their clients (*id.* at 42a-44a). She therefore concluded that Congress could not " 'plainly' [have] resolved an immunity waiver issue never even framed in the course of its deliberations" (*id.* at 41a).[3]

The Library's petition for rehearing en banc was denied, with Judges Ginsburg, Bork, Scalia, and Starr dissenting (App., *infra*, 73a-75a).

REASONS FOR GRANTING THE PETITION

The decision below announces an expansive reformulation of the sovereign immunity doctrine. For more than a century, this Court consistently has held that federal statutes should not be deemed to allow interest to run on a recovery against the United States unless Congress affirmatively desired that result and announced its intentions in unambiguous terms. The court of appeals' contrary conclusion—that 42 U.S.C. 2000e5(k) effected a waiver of sovereign immunity as to interest despite the absence of anything in the statute or its legislative history indicating an affirmative intention on the part of Congress to do so[4]—cannot be reconciled with these decisions.

By departing from the settled law in this area, the District of Columbia Circuit has precipitated a conflict in principle with the decisions of two other courts of appeals, which have held that language in a statute virtually identical to Section 2000e-5(k) does not make the government liable for interest on attorneys' fees. Perhaps more important, it has opened the federal treasury to a potentially wide range of monetary awards that were unanticipated, and not consciously authorized, by Congress. And it has effectively substituted the judgment of the courts for that of Congress in determining when the federal government's sovereign immunity is appropriately deemed waived. In these circumstances, review of the decision below by this Court is warranted.

1. It is common ground that an award of interest against the United States is permissible only if Congress has waived the government's sovereign immunity as to such an award. In determining whether Congress has done so, this Court has indicated that analysis should begin with the principle that "[w]aivers of immunity must be 'construed strictly in favor of the sovereign,' *McMahon* v. *United States*,

---

[3] Although Judge Ginsburg thus found no justification in the statute for an award of interest against the United States, she suggested that, under *Murray* v. *Weinberger*, 741 F.2d 1423 (D.C. Cir. 1984), there is a meaningful distinction between "interest" and an "adjustment for delay in receipt of payment" (App., *infra*, 38a). She explained: "[j]ust as an attorney setting an hourly rate in a contingent fee case may factor in the risk that the cause may not prevail, so too an attorney embarking on services for which he or she anticipates payment ultimately, but not promptly, may factor in the expected delay" (*id.* at 38a-39a). Judge Ginsburg therefore would require a district court to determine whether an attorney's historic rates (those that he charged at the time that he did the work at issue) were enhanced by such a delay factor. If so, the attorney would be entitled to reimbursement at that enhanced rate—but not to any additional recovery because of actual delay in receiving fees. If the historic rate did not contain a component for anticipated delay in the receipt of fees, however, Judge Ginsburg in an "appropriate" case would permit the district court to use current market rates rather than historic rates in computing the lodestar, if doing so would not generate a windfall for the attorney. *Id.* at 50a-53a.

[4] The case before the court of appeals involved only prejudgment interest. As Judge Ginsburg noted (App., *infra*, 44a-45a n.5), however, the logic of the court of appeals' holding applies to post- as well as prejudgment interest.

342 U.S. 25, 27 (1951), and not 'enlarge[d] * * * beyond what the language requires,' *Eastern Transp. Co.* v. *United States*, 272 U.S. 675, 686 (1927)." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983).[5] And, as the court below acknowledged (App., *infra*, 13a), even when Congress has expressly permitted collection on substantive claims against the United States, the " 'traditional rule' [is] that interest on [such] claims cannot * * * be recovered" unless the awarding of interest was affirmatively and separately contemplated by Congress. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951).

The court of appeals found that Section 2000e-5(k) evidences such congressional intent—despite the omission from the statute of any reference to interest (see App., *infra*, 17a n.49)—because private employers may be held liable for interest on attorneys' fees under Title VII, and the statute generally measures the liability of the United States against that of private defendants (App., *infra*, 14a-16a).[6] The court of appeals' approach, however, cannot be reconciled with the analysis that this Court consistently has applied

[5] Accord *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981); *United States* v. *Testan*, 424 U.S. 392, 400-401 (1976); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957); *United States* v. *Sherwood*, 312 U.S. 584, 586-587, 590 (1941).

[6] Although respondent argued to the contrary in the court of appeals (see App., *infra*, 10a), both the majority and the dissenting opinions correctly concluded that the 30% upward adjustment—which explicitly was intended to compensate respondent's attorney for delay in the receipt of payment (see *id.* at 11a-12a)—was "interest." See *United States* v. *North American Transp. & Trading Co.*, 253 U.S. 330, 338 (1920); *Blake* v. *Califano*, 626 F.2d 891, 895 (D.C. Cir. 1980); *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976).

in resolving claims for interest against the federal government.

a. Some 100 years ago, the Court was relying on what already was a "well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect." *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251, 260 (1888). Since that time, the Court repeatedly has reaffirmed the notion that, "[a]part from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent * * * by Congress,' interest does not run on a claim against the United States." *United States* v. *Louisiana*, 446 U.S. 253, 264-265 (1980), quoting *Smyth* v. *United States*, 302 U.S. 329, 353 (1937).[7] Thus, a waiver of immunity is effective only "where interest is given expressly by an act of Congress, either by the name of interest or by that of damages." *Bayard*, 127 U.S. at 260. "The waiver cannot be by implication or by use of ambiguous language" (*Holly* v. *Chasen*, 639 F.2d 795, 797 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981)); the "consent necessary to waive the traditional immunity must be express, and it must be strictly construed." *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947). Accord *Tillamooks*, 341 U.S. at 49; *Albrecht* v. *United States*, 329 U.S. 599, 605 (1947); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 590 (1947); *United States* v. *Goltra*, 312 U.S. 203, 207 (1941); *United States* v.

[7] The "constitutional requirements" arise in takings under the Just Compensation Clause; the Court has held that just compensation must include a payment for interest. See, *e.g.*, *Tillamooks*, 341 U.S. at 49; *Albrecht* v. *United States*, 329 U.S. 599, 605 (1947); *Smyth*, 302 U.S. at 353-354.

Worley, 281 U.S. 339, 341 (1930); *Boston Sand Co.* v. *United States*, 278 U.S. 41, 46 (1928); *United States* v. *North American Trans. & Trading Co.*, 253 U.S. 330, 336 (1920); *United States* v. *North Carolina*, 136 U.S. 211, 216 (1890); *United States* v. *Sherman*, 98 U.S. 565, 567-568 (1878).[8]

In applying these principles, the courts have held virtually without exception that the government's immunity can be found to have been waived in this context only when Congress affirmatively considered the interest question and unambiguously affirmed its intention that interest should be available. See *Holly*, 639 F.2d at 797. Cf. *Lehman* v. *Nakshian*, 453 U.S. 156, 168 (1981); *United States* v. *King*, 395 U.S. 1, 4 (1969). This and other courts therefore have held, for example, that interest could not be awarded when the United States was required to disgorge funds under an agreement that had permitted it to collect and use revenues from disputed lands pending a determination of ownership (*United States* v. *Louisiana*, 446 U.S. at 261-264), or when, "in the adjustment of mutual claims" with a private party, the United States was awarded interest on *its* claims. *North American Trans. & Trading Co.*, 253 U.S. at 336; *United States* v. *Verdier*, 164 U.S. 213, 218-219 (1896).

[8] Several of these cases involved the construction of predecessors to 28 U.S.C. 2516(a), which permits an award of interest on judgments against the United States in the Claims Court "only under a contract or Act of Congress expressly providing for payment thereof." The Court repeatedly has emphasized, however, that the statute simply "codifies the traditional rule" (*N.Y. Rayon*, 329 U.S. at 658) that the government is immune "from the burden of interest unless it is specifically agreed upon by contract or imposed by legislation." *Goltra*, 312 U.S. at 207 (footnote omitted). See *Thayer*, 329 U.S. at 588; *Blake*, 626 F.2d at 894 n.6.

Interest also has been ruled unavailable under statutes or contracts directing the United States to pay the " 'amount equitably due' " (*Tillson* v. *United States*, 100 U.S. 43, 46 (1879)), or "any * * * equitable relief * * * the court deems appropriate" (*Blake* v. *Califano*, 626 F.2d 891, 893 (D.C. Cir. 1980)), or "just compensation" (*e.g.*, *Tillamooks*, 341 U.S. at 49; *Goltra*, 312 U.S. at 207-211)—even though "just compensation" for constitutional purposes has long been understood to *require* payment of interest (see note 7, *supra*). Indeed, the Court has indicated that even statutory language basing federal liability " 'upon the same principle and measure * * * as in like cases * * * between private parties' " generally "ha[s] been understood * * * not to carry interest." *Boston Sand*, 278 U.S. at 46, 47.[9]

[9] There is thus no merit to the court of appeals' suggestion that the traditional "no-interest rule" is inapplicable when the statute at issue "measures the liability of the United States by that of private persons" (App., *infra*, 24a-36a). Most of the decisions cited by the court of appeals on this point stand only for the unexceptionable proposition that courts should not frustrate "deliberate" waivers of sovereign immunity. *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 222 (1945) (cited at App., *infra*, 29a); see, *e.g.*, *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955) (cited at App., *infra*, 27a); *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 548 (1951) (cited at App., *infra*, 28a). Nor does *Standard Oil Co.* v. *United States*, 267 U.S. 76 (1925) (cited at App., *infra*, 33a-34a) provide support for the court of appeals' conclusion. That decision held the United States liable for interest on insurance policies issued under the War Risk Insurance Act of 1914, ch. 293, 38 Stat. 711 *et seq.*, only because that insurance program was a for-profit venture making use of standard commercial insurance contracts. See *United States* v. *Worley*, 281 U.S. 339, 342 (1930). The Court has declined to apply *Standard Oil* outside of its specific commercial and contractual context. *Worley*, 281 U.S. at 343-344.

b. The approach used by the court below in its analysis of Section 2000e-5(k) cannot be squared with this settled law. That statute, of course, makes no reference to interest, express or otherwise. And as Judge Ginsburg observed, an examination of its legislative history indicates that the interest issue "never even [was] framed in the course of [Congress's] deliberations" (App., *infra*, 41a), let alone addressed and resolved. Cf. *Segar* v. *Smith*, 738 F.2d 1249, 1296 (D.C. Cir. 1984), cert. denied, No. 84-1200 (May 20, 1985); *Blake*, 626 F.2d at 894).[10]

Section 2000e-5(k) thus stands in sharp contrast to the other statutes in which Congress has permitted interest to run on substantive recoveries against the United States. Those provisions in terms provide for awards of interest, and spell out the "procedures which a plaintiff must follow to perfect his entitlement to interest, the rate of interest which the United States will pay on each type of judgment, and the time when interest will start to run and the time it will stop." *Arvin* v. *United States*, 742 F.2d 1301, 1303 (11th Cir. 1984). See *Holly*, 639 F.2d at 797-

[10] Section 2000e-5(k) was enacted in its current form as Section 706(k) of the Civil Rights Act of 1964, Pub.L. No. 88-352, 78 Stat. 261. The legislative history of the provision is "sparse" (*Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 420 (1978)), and so far as we have been able to determine it contains not a single reference to the availability of interest. Similarly, we have been unable to uncover anything bearing on the interest question in the legislative history of the Equal Employment Opportunity Act of 1972, Pub.L. No. 92-261, 86 Stat. 103, 42 U.S.C. 2000e *et seq.*, which made Title VII applicable to federal employees. See generally H.R. Rep. 92-899, 92d Cong., 2d Sess. (1972); S. Rep. 92-681, 92d Cong., 2d Sess. (1972); H.R. Rep. 92-238, 92d Cong., 1st Sess. (1971); S. Rep. 92-415, 92d Cong., 1st Sess. (1971).

798.[11] There is no reason to believe that Congress—which was, of course, legislating against the background of the "no-interest rule"—intended Section 2000e-5(k) to signal a strikingly backhanded and understated "depart[ure] from its usual practice in this area." *Nakshian*, 453 U.S. at 162.[12] See *id.* at

[11] See 26 U.S.C. 7426(g) (providing for interest in cases of wrongful levy by the Internal Revenue Service running from the date of the levy); 28 U.S.C. 1961(c)(2) (providing for interest on final judgments of the United States Court of Appeals for the Federal Circuit in claims against the United States); 28 U.S.C. 2411 (providing for interest on overpayments of federal tax running from the date of overpayment); 31 U.S.C. 1304(b)(1)(A) (appropriating funds for interest on certain district court judgments after an unsuccessful appeal by the United States "and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance"); 31 U.S.C. 1304(b)(1)(B) (appropriating funds in similar circumstances for interest on decisions of the Federal Circuit and the Claims Court after affirmance by the Supreme Court (see 28 U.S.C. 2516(b)). Cf. 31 U.S.C. 3728(c) (providing for the payment of interest on debts wrongfully withheld by the Comptroller General in certain set-off situations); 40 U.S.C. 258a (providing for the payment of interest as part of the compensation in proceedings for the taking of property by the United States). Congress also has provided that "[i]nterest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof." 28 U.S.C. 2516(a).

[12] This is particularly true where, as here, it is claimed that Congress implicitly allowed an award of *prejudgment* interest. In the absence of exceptional circumstances or a statutory provision to the contrary, the usual rule is that such interest may be awarded only from the date on which the damages were liquidated or readily calculable. See generally *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 651-652 & n.5 (1983), and cases cited; *Rodgers* v. *United States*, 332 U.S. 371, 373 (1947). Cf. *Perkins* v. *Standard Oil Co. of Cali-*

161, 168-169 (holding trial by jury impermissible in suits against the United States under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a, because Congress "has almost always conditioned [waiver of sovereign immunity] upon a plaintiff's relinquishing any claim to a jury trial" and has not "affirmatively and unambiguously" provided that right in the ADEA). Cf. *Sierra Club*, 463 U.S. at 685 (when Congress is asserted to have departed from traditional fee shifting rules "a clear showing that this result was intended is required" (footnote omitted)). Indeed, two courts of appeals have relied on precisely these considerations in holding that awards of interest against the United States are not authorized by the atorneys' fee provision of the Equal Access to Justice Act (28 U.S.C. 2412(b) (making the United States liable for fees "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award")), which in relevant part is virtually identical to Section 2000e-5(k).[13] *Arvin*, 742 F.2d at 1304; *Knights of the*

fornia, 487 F.2d 672, 675 (9th Cir. 1973) (under 15 U.S.C. 15, "claims for 'reasonable' attorneys' fees, being unliquidated until they are determined by a court, are not entitled to pre-judgment interest as would be certain liquidated claims"); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 701 F.2d 542, 544 & n.3 (5th Cir. 1983) (affirming an award of interest on attorneys' fees under 15 U.S.C. 15 only from the time of the "judgment recognizing the right to costs and fees"). Had Congress intended to depart from that traditional rule, it presumably "would have used explicit language to [that] effect." *Sierra Club*, 463 U.S. at 685 n.7.

[13] Other provisions of the Equal Access to Justice Act authorizing fee awards against the United States when the government's position in litigation was not substantially justified, 5 U.S.C. 504 and 28 U.S.C. 2412(d), expired on October 1, 1984. Sections 203(c) and 204(c), Pub. L. No. 96-481, 94 Stat. 2327, 2329. Congress is currently considering a bill that would reenact these provisions, however. H.R. 2378, 99th Cong., 1st Sess. (1985). See H.R. Rep. 99-120, 99th Cong., 1st Sess. (1985). Significantly, this bill would add an explicit provision to 28 U.S.C. 2412 allowing for interest on fee awards, but only if the government challenges the award of fees on appeal and loses. H.R. 2378, *supra*, § 2(e).

Ku Klux Klan v. *East Baton Rouge Parish School Board*, 735 F.2d 895, 902 (5th Cir. 1984).[14]

Title VII itself, in fact, contains considerable evidence that the congressional scheme was not intended to permit attorneys to obtain interest on their fees in cases against the United States. While Title VII *plaintiffs* may be awarded interest on back pay awards against private employers (see, *e.g.*, *Blake*, 626 F.2d at 893 & n.3 and cases cited), it is settled law that interest does not run on back pay recovered from the United States. *Segar*, 738 F.2d at 1296; *Saunders* v. *Claytor*, 629 F.2d 596, 598 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981); *Blake*, 626 F.2d at 984; *deWeever* v. *United States*, 618 F.2d 685, 686 (10th Cir. 1980); *Fischer* v. *Adams*, 572 F.2d 406, 411 (1st Cir. 1978); *Richerson* v. *Jones*, 551 F.2d 918, 925 (3d Cir. 1977); *Cross* v. *United States Postal Service*, 733 F.2d 1327, 1329, affirmed by an equally divided en banc court, 733 F.2d 1332 (8th Cir. 1984), cert. denied, No. 84-979 (Mar. 18, 1985). Had Congress given any attention to the interest question—and an award of interest could have been affirmatively authorized only if Congress did so—it is difficult to imagine that, in a single legislative

[14] The Second Circuit has affirmed a district court judgment that included an award of interest against the Department of Health and Human Services under 28 U.S.C. 2412(b)'s companion provision, 28 U.S.C. 2412(d)(1)(A) (see note 13, *supra*), but it did so without discussion. *Marziliano* v. *Heckler*, 728 F.2d 151, 155, 159 (2d Cir. 1984). See *East Baton Rouge*, 735 F.2d at 902 n.8.

package, it would have chosen to accord plaintiffs' lawyers more favorable treatment than that accorded plaintiffs themselves.

2. The court of appeals' novel approach to sovereign immunity will have significant and, in many cases, unpredictable effects. Its direct impact in the Title VII area alone will be substantial: the General Accounting Office informs us that, in fiscal year 1984, the United States made payments to plaintiffs in over 150 Title VII suits (in almost all of which, presumably, liability for attorneys' fees attached). And the availability of prejudgment interest can be expected to affect not only the dollar amount of the fee awards in such cases (which the General Accounting Office informs us totals several million dollars annually) but also the conduct of a substantial body of employment litigation.

The court of appeals' analysis, in any event, is plainly applicable in areas beyond Title VII. That it leads to departures from this Court's precedents and the conclusions of other circuits already is evident: as Judge Ginsburg noted, the panel majority's treatment of Section 2000e-5(k) has "precipitat[ed] an apparent circuit split" (App., *infra*, 56a n.14) with decisions holding that the virtually identical fees provision of the Equal Access to Justice Act does not authorize interest awards. *Arvin*, 742 F.2d at 1304; *East Baton Rouge*, 735 F.2d at 902.[15] The analysis used below thus threatens one of the principal purposes served by the requirement that Congress expressly waive the "no-interest rule"—the protection of the treasury from unexpected liabilities arising at unanticipated times. This danger is particularly

[15] The panel majority itself noted that the attorneys' fees provision of the Equal Access to Justice Act is "strikingly similar" to Section 2000e-5(k), and seemingly disapproved the holding in *Arvin* (App., *infra*, 29a-30a & n.107).

noticeable where, as here, an award of prejudgment interest is concerned, for such liability may be found to have attached years after the fact for reasons that were wholly beyond the government's control. In this case, for example, the district court withheld assessment of an attorneys' fee for one year pending the decision in *Copeland* and for a second year while the fee issue was under submission, and then ordered the government to pay interest on a fee generated three years earlier. See page 3, *supra*.

Most basically, the court of appeals' conclusion that courts may infer waivers of immunity from ambiguous statutory language infringes in a direct way on the congressional prerogative to waive the government's sovereign immunity. For over 100 years, Congress has been legislating against the background of—and presumably relying upon—the "no-interest rule" that consistently has been propounded by this Court. If congressional legislation is to be interpreted in light of a new controlling principle, it is for this Court to make that judgment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

RICHARD K. WILLARD
Acting Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

WILLIAM KANTER
AL J. DANIEL, JR.
Attorneys

JULY 1985

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1019

TOMMY SHAW

v.

LIBRARY OF CONGRESS, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia
(Civil Action No. 79-00325)

Argued September 9, 1982

Decided November 6, 1984

Before: ROBINSON, *Chief Judge*, WALD and GINSBURG, *Circuit Judges*.

Opinion for the Court filed by *Chief Judge* ROBINSON.

Dissenting Opinion filed by *Circuit Judge* GINSBURG.

ROBINSON, *Chief Judge*: A corollary to the doctrine of sovereign immunity exempts the United States from liability for interest absent its express consent thereto.[1] The sole issue on this appeal is whether the District Court dishonored that precept when, in assessing an attorneys' fee against the United States, it effected a 30 percent upward adjustment of the lodestar[2] to compensate the attorney for delay in receipt of payment.

We sustain the adjustment alternatively on two grounds. First, we conclude that the language of the statute authorizing allowances of attorneys' fees against the United States in employment-discrimination cases waives its sovereign immunity with respect to the delay component of the fee award. Second, we find that component validated by a line of cases relaxing the traditional rigor of the sovereign-immunity doctrine.

I

In 1976 and again in 1977, Tommy Shaw, a black employee of the Library of Congress, submitted complaints of job-related racial discrimination to the Li-

[1] See Part IV *infra*.

[2] The lodestar component of an attorneys' fee is the product of "the number of hours reasonably expended multiplied by a reasonable hourly rate." *Copeland* v. *Marshall*, 205 U.S.App. D.C. 390, 401, 641 F.2d 880, 891 (*en banc* 1980).

brary's Equal Employment Office.[3] In 1978, after the Library remained resistant to these complaints, Shaw's counsel engaged in administrative proceedings and during the course thereof entered into negotiations which culminated in a settlement agreement.[4] As part of the settlement, the Library agreed to promote Shaw retroactively with backpay provided the Comptroller General first determined that the Library had authority to do so without a specific finding of racial discrimination.[5] The Comptroller General, however, held that the Library lacked power under the Back Pay Act of 1966[6] to pursue that course.[7]

Dissatisfied with this turn of events, Shaw sued in the District Court[8] and ultimately prevailed on

[3] See Complaint ¶ 12, *Shaw* v. *Library of Congress*, Civ. No. 79-0325 (D.D.C.) (filed Feb. 1, 1979), Record Document (R. Doc.) 1 [hereinafter cited as Complaint].

[4] Settlement Agreement and General Release (filed Feb. 1, 1979), Exhibit 1 to Complaint, *supra* note 3, R. Doc. 1 [hereinafter cited at Settlement Agreement].

[5] *Id.* at pp. 4-5, R. Doc. 1.

[6] Act of Mar. 30, 1966, Pub. L. No. 90-380, § 1(34)(c), 80 Stat. 94 (codified as amended at 5 U.S.C. §§ 5595-5596 (1982)).

[7] Letter from Paul G. Dembling to Donald C. Curran (Nov. 2, 1978), Exhibit 2 to Complaint, *supra* note 3, R. Doc. 1. The Comptroller General declined to consider whether the Civil Rights Act of 1964, Pub. L. No. 88-352, tit. VII, § 717(b), 78 Stat. 251, as amended by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified as amended at 42 U.S.C. § 2000e-16(b) (1982)), authorized retroactive promotion and backpay in Shaw's instance, presumably because the Library inquired only as to its authority under the Back Pay Act.

[8] *Shaw* v. *Library of Congress*, Civ. No. 79-0325 (D.D.C.).

his position that the Library had authority to afford the relief specified in the settlement accord.[9] As a result of Shaw's victory, the court ordered that he be awarded litigation costs and reasonable attorneys' fees,[10] withholding, however, determination of the dollar amount thereof until after further proceedings and this court's decision in *Copeland* v. *Marshall*,[11] then pending *en banc*.[12] By this time, primary responsibility for prosecution of Shaw's claim had developed upon new lawyers, but the efforts of his earlier counsel before the Library and in the District Court had involved considerable time and energy.[13] After our decision in *Copeland* was announced, counsel moved for an allowance of attorneys' fees,[14] requesting compensation at the rate of $85 per hour

---

[9] *Shaw* v. *Library of Congress*, 479 F.Supp. 945, 947-949 (D.D.C. 1979).

[10] *Id.* at 950.

[11] *Supra* note 2.

[12] *Shaw* v. *Library of Congress*, *supra* note 9, 479 F.Supp. at 950.

[13] Shalon Ralph, the fee claimant in this litigation, succeeded another attorney as Shaw's counsel in early 1978, while the case was in its administrative phase. Additional counsel for Shaw entered the picture shortly thereafter, and their claims for attorneys' fees have been settled. Ralph participated in the administrative proceedings and negotiations, and assisted the other counsel in preparation of a brief to the Comptroller General and in their representation of Shaw in the District Court. Hereinafter when we speak of Shaw's counsel, we refer to Ralph.

[14] Plaintiff's Motion for Award of Attorney's Fees and Costs, *Shaw* v. *Library of Congress*, Civ. No. 79-0325 (D.D.C.) (filed May 11, 1981), R. Doc. 37.

for 103.75 hours of work on Shaw's behalf during the course of those proceedings.[15]

Largely dismissing the Library's challenges to both the hourly rate and the number of hours claimed by Shaw's counsel,[16] the District Court computed a lodestar of $8,435,[17] based on 99 hours of work at the $85 proposed hourly rate, excluding from its calculation 4.75 hours which counsel devoted to research in an abortive effort to impart a class-action aspect to Shaw's administrative complaints.[18] The court then reduced the lodestar by 20 percent to reflect the quality of counsel's representation.[19] Lastly, and most importantly for this appeal, the court increased the lodestar by 30 percent to compensate counsel for the delay in actual payment for the legal services he had rendered.[20] The court explained:

> This case should have ended in August 1978, or at the latest in November of that year. If [Shaw's counsel] had been compensated at about that time, he could have invested the money at an average yield of not less than 10% per year.

---

[15] *Id.* § II(2), R. Doc. 37.

[16] See Defendant's Memorandum of Points and Authorities in Opposition to Motion for Attorney's Fees, *Shaw* v. *Library of Congress*, Civ. No. 79-0325 (D.D.C.) (filed June 11, 1981), R. Doc. 41.

[17] The District Court made a mathematical mistake when it calculated the lodestar at $8,435; 99 hours of work at $85 per hour comes to $8,415, not $8,435. We accordingly treat the lodestar as lowered to $8,415.

[18] *Shaw* v. *Library of Congress*, Civ. No. 79-0325 (D.D.C. Nov. 4, 1981) (memorandum) at 6-8, R. Doc. 45.

[19] *Id.* at 8-9, R. Doc. 45.

[20] *Id.* at 9-10, R. 45.

> It is the fault of neither [Shaw] nor [counsel] that payment was not made sooner. It is reasonable to assume that if payment is made promptly, counsel will receive his reimbursement by December 1, 1981. Accordingly, the accompanying order reflects an upward adjustment of 30% for the delay.[21]

Then, offsetting the 30 percent increase in the lodestar by the 20 percent reduction in the lodestar, the District Court granted a net 10 percent addition to the lodestar[22] and, accordingly, awarded counsel a fee of $9,278.50.[23] The Library has appealed,[24] ar-

[21] *Id.*, R. Doc. 45 (footnote omitted). The court further justified the adjustment on the ground that the Library might earlier have tendered partial payment to counsel despite the outstanding appeal in *Copeland* v. *Marshall*. *Id.* at 9 n.4, R. Doc. 45.

[22] *Id.* at 10, R. Doc. 45. Our dissenting colleague implies that the District Court unfairly penalized counsel by utilizing simple rather than compound interest, and committed arithmetic error when it increased the lodestar by 30% and then reduced that figure by 20% of the lodestar, rather than by 20% of the upwardly adjusted figure. See Dissenting Opinion (Dis. Op.) at 16 n. 13. Judges have broad latitude in setting attorneys' fees, *Copeland* v. *Marshall*, *supra* note 2, 205 U.S. App.D.C. at 411, 641 F.2d at 901; *Cuneo* v. *Rumsfeld*, 180 U.S.App.D.C. 184, 192, 553 F.2d 1360, 1368 (1977), and in neither of these respects can we say that the District Court abused its discretion.

[23] *Shaw* v. *Library of Congress*, *supra* note 18, at 10, R. Doc. 45. The court also awarded Shaw $47.50 in costs, *id.*, which the Library does not challenge on appeal.

[24] After oral argument on appeal, we ordered the Library to pay to counsel $6,779.50, the portion of the award not in dispute. *Shaw* v. *Library of Congress*, No. 82-1019 (D.C. Cir. Jan. 19, 1983) (partial judgment).

guing that the 30 percent upward adjustment for delay infringes the rule that interest may not be assessed against the United States in the absence of waiver.[25]

II

The issue posed on appeal is hardly one of first impression. In *Copeland* v. *Marshall*,[26] we declared *en banc* that the United States can be held liable under Title VII of the Civil Rights Act of 1964[27] for attorneys' fees in an amount augmented to compensate for the lag attending payment. We said:

> The delay in receipt of payment for services rendered is an additional factor that may be incorporated into a contingency adjustment. The hourly rates used in the "lodestar" represent the prevailing rate for clients who typically pay their bills promptly. Court-awarded fees normally are received long after the legal services are rendered. That delay can present cash-flow problems for the attorneys. In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable. A percentage adjustment to reflect the delay in receipt of payment therefore may be appropriate.[28]

[25] Brief for Appellant at 5-8.

[26] *Supra* note 2.

[27] Pub. L. No. 88-352, tit. VII, § 706(k), 78 Stat. 261 (1964) (codified as amended at 42 U.S.C. §§ 2000e-5(k) (1982)) [hereinafter cited as codified].

[28] *Copeland* v. *Marshall*, *supra* note 2, 205 U.S.App.D.C. at 403, 641 F.2d at 893 (footnotes and citation omitted). We also

We have subsequently reaffirmed this principle [29] and, indeed, have upheld an award of attorneys' fees

endorsed calculation of the lodestar on presently-prevailing hourly rates as an alternative method of compensating attorneys for delay. *Id.* at 403 n.23, 641 F.2d at 893 n.23.

We may note here that, regardless of whether the defendant is the United States or a private party, a delay-in-payment adjustment would be appropriate only where the lodestar is the per-hour charge to clients who pay when billed. *Murray* v. *Weinberger*, Civ. No. 83-1680 (D.C. Cir. Aug. 24, 1984) at 17. If the lodestar represents a higher rate charged clients who sue under fee-shifting statutes, it has already taken into account the pecuniary disadvantage resulting from the lengthy wait for payment ordinarily encountered under such statutes. In such an instance, an upward adjustment for delay would, of course, result in the attorney being paid twice for the delay. It appears that the cases relied on by the District Court in setting the $85 per-hour lodestar for counsel here did not in any way include a delay element in their own per-hour rate calculations. *North Slope Borough* v. *Andrus*, 515 F.Supp. 961 (D.D.C. 1981), *rev'd on other grounds sub nom. Katkovik* v. *Watt*, 223 U.S.App.D.C. 37, 689 F.2d 222 (1982); *Bachman* v. *Pertschuk*, 19 Empl. Practice. Dec. (CCH) ¶ 9044, at 6507 (D.D.C. 1979). *See Shaw* v. *Library of Congress, supra* note 18, at 7, R. Doc. 45. Our disposition of this appeal, however, will include a remand in order that the District Court may make certain that counsel is not being awarded double compensation for the delay.

[29] *Jordan* v. *United States Dep't of Justice*, 223 U.S.App. D.C. 325, 329, 691 F.2d 514, 518 (1982) (involving claim for attorneys' fees against United States under provision of Freedom of Information Act (citing *Copeland* v. *Marshall, supra* note 2, 205 U.S.App.D.C. at 402-403, 641 F.2d at 892-893, for proposition that attorneys' fee award may reflect delay in payment)); *National Ass'n of Concerned Veterans* v. *Secretary of Defense*, 219 U.S.App.D.C. 94, 103, 110, 675 F.2d 1319, 1328, 1335 (1982) (affirming propriety of adjusting attorneys'-fee award against United States to compensate for delay in two Freedom of Information Act cases and one Title VII case).

against the United States that in fact was adjusted upward to compensate for delay.[30]

Despite the seemingly clear applicability of these precedents, however, we do not rest our disposition on stare decisis alone. Whether an upward delay adjustment in an attorneys'-fee award satisfies the rigorous requirements of the sovereign-immunity doctrine is an issue we have dealt with only peripherally,[31] and one we have never squarely addressed. We recognize, too, the jurisdictional implications of any legal bar created by that doctrine, and acknowledge the existence of decisions of this circuit arguably in conflict with *Copeland* and its progeny on this point.[32] We therefore opt to consider the Library's

[30] *EDF* v. *EPA*, 217 U.S.App.D.C. 189, 206, 672 F.2d 42, 59 (1982). Cf. *Murray* v. *Weinberger, supra* note 28, at 16-19 (allowing a properly-justified adjustment to lodestar for delay in payment in a Title VII attorneys' fee claim).

[31] See *Copeland* v. *Marshall, supra* note 2, 205 U.S.App.D.C. at 404-405 & n.25, 641 F.2d at 894-895 & n.25 (holding that liability for attorneys' fees under Title VII is the same for the United States as for any private party); *Holly* v. *Chasen*, 205 U.S.App.D.C. 273, 276, 639 F.2d 795, 798, *cert. denied*, 454 U.S. 822, 102 S.Ct. 107, 70 L.Ed.2d 94 (1981) (overturning, on grounds of sovereign immunity, award of interest on judgment against United States in a Freedom of Information Act case, but expressly reserving question whether upward adjustment in an attorneys' fee award to compensate for delay would likewise be invalid).

[32] See *Holly* v. *Chasen, supra* note 31; *Blake* v. *Califano*, 200 U.S.App.D.C. 27, 626 F.2d 891 (1980). The dissent's use of broad language in *Segar* v. *Smith*, —— U.S.App.D.C. ——, ——, 738 F.2d 1249, 1296 (1984), may give the impression that the attorneys'-fee provision at issue here, 42 U.S.C. § 2000e-5(k) (1982), was involved in *Segar*. Dis. Op. at 5. *Segar* concerned only an award of interest under the backpay section of Title VII, 42 U.S.C. § 2000e-5(g); the dispute did

argument much as if it were presented upon a clean slate.

III

The initial inquiry, of course, is whether the District Court's 30 percent augmentation of the lodestar for delay in payment of the fee constitutes "interest" against the United States within the contemplation of the rule invoked by the Library. Shaw characterizes this component of the fee award as a proper ingredient of a reasonable attorneys' fee, in contradistinction to interest.[33] The only way to determine whether this addition to the lodestar is condemned by the traditional interest rule is to ascertain what that rule prohibits.

Perhaps the clearest example of interest appears when a court, after calculating the amount of monetary judgment, adds a percentage of that amount to compensate the claimant for loss of use of the money during the period between the claimant's initial entitlement to the money and the day the judgment is rendered.[34] Here the long-established rule refuses to view the sovereign as having consented to the addition, even though consent to suit on the claim has been established.[35] The same results follow court-awarded sums which, though not interest calculated

---

not extend to interest under the attorneys'-fee provision, 42 U.S.C. § 2000e-5(k) (1982), which uses language wholly different from that employed in the backpay section.

[33] Brief for Appellant at 10.

[34] E.g., *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 587-588, 67 S.Ct. 398, 399, 91 L.Ed. 521, 525 (1947).

[35] E.g., *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 71 S.Ct. 552, 95 L.Ed. 738 (1951); *United States* v. *Goltra*, 312 U.S. 203, 61 S.Ct. 487, 85 L.Ed. 776 (1941).

in the classic manner, nonetheless are functionally equivalent to interest. Thus the Supreme Court has rejected a contention that an increase in an assessment by the Court of Claims against the United States, made as compensation for loss of use and occupation of a mining claim appropriated by the United States years earlier, was "compensation" rather than interest.[36] The Court reasoned that because "the loss of the use of the money results from the failure to collect sooner a claim held to have accrued when the company's property was taken, that which the company seeks to recover is, in substance, interest." [37] We ourselves recently held an "inflation adjustment" in awards of backpay to federal employees amounted to interest against the United States because it served "the same general end of compensating the recipient for differences in the worth of her award between the date of actual receipt and the date as of which the money should have been paid." [38]

In the case at bar, the District Court's 30 percent addition to the lodestar was designed to reimburse Shaw's counsel for the decrease in value of his uncollected legal fee between the date on which he concluded his legal services and the court's estimated date of likely actual receipt.[39] By the court's own

---

[36] *United States* v. *North Am. Transp. & Trading Co.*, 253 U.S. 330, 40 S.Ct. 518, 64 L.Ed. 935 (1920).

[37] *Id.* at 338, 40 S.Ct. at 521, 64 L.Ed. at 939.

[38] *Blake* v. *Califano*, *supra* note 32, 200 U.S.App.D.C. at 31, 626 F.2d at 895. Accord, *Saunders* v. *Claytor*, 629 F.2d 596, 598 (9th Cir. 1980), *cert. denied*, 450 U.S. 980, 101 S.Ct. 1515, 67 L.Ed.2d 815 (1981) ("[i]n essence, the inflation factor adjustment is a disguised interest award").

[39] See text *supra* at note 21.

description, the addition was based on a rough determination of the "average yield" of the amount of the fee if invested at 10 percent per annum for three years.[40] We think the adjustment falls well within the contours of the interest concept. Only by ignoring applicable caselaw as well as the real nature of the disputed adjustment could we find anything other than an assessment of interest against the United States.[41] We proceed, then, to the Library's conten-

[40] *Shaw* v. *Library of Congress, supra* note 18, at 9-10, R. Doc. 45.

[41] See *United States* v. *Mescalero Apache Tribe,* 518 F.2d 1309, 1322 (Ct. Cl. 1975), *cert. denied,* 425 U.S. 911, 96 S.Ct. 1506, 47 L.Ed.2d 761 (1976) ("the character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it") (footnote omitted).

The dissent suggests that an upward adjustment of an attorneys' fee to compensate for delayed receipt can be differentiated from interest on the ground that the former applies "prospectively" while interest is awarded "retrospectively." Dis. Op. at 1, 4-5. This distinction apparently takes on dispositive significance. We note that any prospectivity here is fictional, for an award under a fee-shifting statute benefiting only a party prevailing in litigation can never be made prospectively. More importanly, we cannot see why the moment in time at or as of which compensation for delayed receipt of payment is calculated should matter; for us, it is the *reason* why the fee is adjusted upward that is vital. Addition of a delay factor to the lodestar serves only to compensate the attorney for loss of the use of earned money from the time of rendition of services to the time of receipt of the fee. See text *supra* at note 28, quoting *Copeland* v. *Marshall, supra* note 2, 205 U.S.App.D.C. at 403, 641 F.2d at 893. The dissent itself, in distinguishing the delay factor from interest, characterizes the delay factor thus: "an attorney embarking on services for which he or she anticipates payment ultimately, but not

tion that the District Court's action in this regard disregards the dictates of the doctrine of sovereign immunity.

IV

The United States cannot be subjected to monetary liability save pursuant to a waiver of its sovereign immunity.[42] Moreover, the scope of such a waiver is to be strictly construed.[43] The instant case involves a corollary of these principles, which for convenience we term the "interest rule." By this rule, the United States may not be held liable for interest absent an express waiver of its immunity.[44] The question we

promptly, may factor in the expected delay." Dis. Op. at 1. By this we can only assume that our colleague means that the increase is to compensate for a supposed possibility of delayed payment, and consequently for deprivation of the use of the fee money during the period of delay. We are unable to distinguish between that and compensation for the use, forbearance or detention of money—the common understanding of interest. If the delay factor sounds like interest, acts like interest and, most of all, compensates exactly as interest would, we feel constrained to treat it as interest for purposes of the sovereign-immunity rule.

[42] E.g., *United States* v. *Sherwood,* 312 U.S. 584, 586, 61 S.Ct. 767, 769, 85 L.Ed. 1058, 1061 (1941); *United States* v. *Lee,* 106 U.S. 196, 1 S.Ct. 240, 27 L.Ed. 171 (1882); *United States* v. *McLemore,* 45 U.S. (4 How.) 286, 11 L.Ed. 977 (1846).

[43] E.g., *United States* v. *Sherwood, supra* note 42, 312 U.S. at 590, 61 S.Ct. at 771, 85 L.Ed. at 1063.

[44] E.g., *United States* v. *Louisiana,* 446 U.S. 253, 264-265, 100 S.Ct. 1618, 1626, 64 L.Ed.2d 196, 208 (1980). Courts have not been entirely consistent in applying this rule, however. Compare *Henkels* v. *Sutherland,* 271 U.S. 298, 46 S.Ct. 524, 70 L.Ed. 953 (1926) (allowing interest as component of assessment against United States for confiscation of securities,

face here is whether Congress has waived that immunity with respect to an allowance of interest as part of an attorneys' fee awarded, as here, under Title VII.

The relevant section of Title VII provides that

> [i]n any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and *the United States shall be liable for costs the same as a private person.*[45]

A private person, of course, may be held liable for interest as an ingredient of a Title VII attorneys'-

---

in part to prevent unjust enrichment), with *Angarica* v. *Bayard*, 127 U.S. 251, 8 S.Ct. 1156, 32 L.Ed. 159 (1888) (disallowing interest as an item in assessment against United States for money withheld from awardee). Courts also have established an exception to the rule in inverse eminent domain cases, in which interest has been allowed as an element of the constitutional measure of just compensation. See *Blake* v. *Califano, supra* note 27, 200 U.S.App.D.C. at 29 n.5, 626 F.2d at 893 n.5, and cases cited therein. For a discussion of two other exceptions, see note 90 and Part V *infra*.

[45] 42 U.S.C. § 2000e-5(k) (1982) (emphasis added). This section was made applicable to the United States in cases such as this by the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 11, 86 Stat. 111 (codified at 42 U.S.C. § 2000e-16(d) (1982)). Though on occasion we have found that asserted statutory waivers of immunity from interest liability were not "express," e.g., *Holly* v. *Chasen, supra* note 31; *Blake* v. *Califano, supra* note 32, we have not heretofore addressed the question whether the cited section effects such a waiver.

fees award,[46] and this section subjects the United States to liability for "costs the same as a private person," and authorizes assessment of a "reasonable attorney's fee as part of the costs." We conclude that Congress thus has waived the immunity of the United States from liability for interest as a component of an attorneys' fee allowed under Title VII.

The statutory waiver is express, and its range is defined in unmistakable language. To say that a private person, but not the United States, is liable under Title VII for interest as an element of an attorneys' fee would rob the unambiguous statutory language of its plain meaning. It would defeat the statutory imposition upon the United States of a liability for costs, and the statutory inclusion of "a reasonable attorney's fee as part of the costs," identical to that of a private party in similar circumstances. The scope-setting statutory words—"the same as a private person"—mark out the United States' liability for attorneys' fees as well as costs in the traditional sense. Our responsibility as judges is to enforce this provision according to its terms.[47]

---

[46] Courts have broad power to allow interest in private-sector cases, e.g., *Rodgers* v. *United States*, 332 U.S. 371, 373-374, 68 S.Ct. 5, 7, 92 L.Ed. 3, 6-7 (1947), and have affirmed this prerogative in attorneys'-fee awards under Title VII. See *Chrapliwy* v. *Uniroyal, Inc.*, 670 F.2d 760, 764 & n.6 (7th Cir. 1982), *cert. denied*, —— U.S. ——, 103 S.Ct. 2428, 77 L.Ed.2d 1315 (1983); *Brown* v. *Gillette Co.*, 536 F.Supp. 113, 123-124 (D. Mass. 1982).

[47] Courts consistently have declined to depart from the plain meaning of statutory language absent clear indication of a contrary legislative intent, e.g., *United States* v. *Turkette*, 452 U.S. 576, 580, 101 S.Ct. 2524, 2527, 69 L.Ed.2d 246, 252 (1981), and have recognized an obligation to avoid a construction of a statutory provision that obviates any term thereof,

We think Congress articulated its goal clearly enough by providing for governmental liability "the same as a private person." Conceivably, Congress might have attempted to effectuate its purpose by legislation listing each item of costs, including interest, for which the United States might be held accountable. That approach, however, could well have led to the discovery of interstices among the enumerated items, especially since the courts would have had to obey the rule requiring strict construction of waivers of sovereign immunity;[48] its adoption, consequently, would not likely have achieved the congressional objective, manifest here, that the United States be treated no differently from private parties in similar circumstances.[49] It seems to us that, de-

---

e.g., *United States* v. *Menasche*, 348 U.S. 528, 538-539, 75 S.Ct. 513, 520, 99 L.Ed. 615, 624 (1955).

The dissent contends that because the word "costs" historically has not included interest as an ingredient, the statutory waiver of the United States' immunity from liability for "costs" cannot reasonably, much less strictly, be construed to extend to interest. Dis. Op. at 7. We cannot subscribe to this reasoning. The Title VII section under scrutiny in terms rejects the traditional concept of costs. It repudiates the commonly-understood difference between costs and attorneys' fees, see, e.g., *Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 759-761, 100 S.Ct. 2455, 2460-2461, 65 L.Ed.2d 488, 496-498 (1980); *Baez* v. *United States Dep't of Justice*, 221 U.S.App. D.C. 477, 480-483, 684 F.2d 999, 1002-1005 (*en banc* 1982); 10 C. Wright, A. Miller & M. Kane, Federal Practice § 2666 at 173-174 (2d ed. 1983), by explicitly establishing attorneys' fees as a subset of costs.

[48] See note 43 *supra* and accompanying text.

[49] As another example, Congress could have enacted a statute providing that "the United States shall be liable for costs, including but not limited to interest, the same as a private person," thus stating the rule of equal treatment and specify-

spite the availability of alternative statutory schemes waiving immunity from interest liability, there is simply no more direct and effective way to ensure complete parity between the United States and other litigants with respect to costs than to say so in so many words. That Congress did so in this section, we conclude, evinces an "express" waiver within the meaning of the interest rule.

Congress obviously understood the broad sweep of language which makes the United States just as liable as "a private person." In the Federal Torts [*sic*] Claims Act,[50] which later we discuss further,[51] Congress made the United States liable for certain torts "in the same manner and to the same extent as a private individual under like circumstances," [52] but immediately curtailed the obvious import of this language by providing that the United States "shall not be liable for interest prior to judgment." [53] It is difficult to understand why Congress bothered to exclude pre-judgment interest if the imposition upon

---

ing interest as an item of possible recovery. We think it an unnecessarily stringent application of the interest rule, however, to treat the waiver here at issue not "express" with regard to the interest component of an attorneys'-fee award simply because Congress did not express itself in precisely that form. To do so would defeat the plain meaning of the relevant statutory language Congress did use, and would penalize Congress for failing to insert redundant language into an already clearly-written and easily-applied waiver of immunity.

[50] Act of Aug. 2, 1946, ch. 753, 60 Stat. 812 (codified as amended at 28 U.S.C. §§ 2671 *et seq.* and other scattered sections of 28 U.S.C. (1982)) [hereinafter cited as codified].

[51] See text *infra* at notes 91-97.

[52] 42 U.S.C. § 2674 (1982).

[53] *Id.*

the United States of liability "to the same extent as a private individual under like circumstances" was insufficient to constitute an express waiver of liability for that interest.

That the attorney's-fee section of Title VII does not actually use the word "interest" does not, in our view, make the waiver any less express. Notwithstanding the long history and wide variety of verbal articulations of the interest rule, we have not uncovered a single case supporting the proposition that a waiver of sovereign immunity is not express merely on that account.[54] In fact, several decisions weigh against that position. The Supreme Court has held that Congress may satisfy the requirements of an analogous rule—that the United States is not bound by its own statutes unless expressly named therein [55]

[54] Most of the cases invoking the interest rule to disallow interest against the United States have done so with respect to two types of statutes. Some have done so in the context of a statute not clearly or even apparently naming the United States as potentially subject to its provisions. E.g., *Holly* v. *Chasen, supra* note 31, 205 U.S.App.D.C. at 274, 639 F.2d at 796 (construing 28 U.S.C. § 1961 (1982)). Others have refused to find waivers in the context of gelatinous or extremely general statutory language, such as those entitling parties "any other equitable relief as the court deems appropriate," *Blake v. Califano, supra* note 32, 200 U.S.App.D.C. at 29-31, 626 F.2d at 893-895 (construing 42 U.S.C. § 2000e-5(g) (1976)), "just compensation," e.g., *United States* v. *Goltra, supra* note 35, 312 U.S. at 207-211, 61 S.Ct. at 490-492, 85 L.Ed. at 780-782 (construing 48 Stat. 1322 (1934)), or "the amount equitably due," *Tillson* v. *United States*, 100 U.S. 43, 46, 25 L.Ed. 543, 544 (1879). In contrast, the statutory provision before us specifically names the United States as a potential payor and stakes out the scope of its liability distinctly.

[55] See 3 A. Sutherland, Statutes and Statutory Construction §§ 62.01-62.04 (C. Sands 4th ed. 1974).

—without identifying the United States in so many words.[56] Additionally, this circuit recently has held,[57] when construing a purported waiver of governmental immunity from liability for attorneys' fees under the *Alyeska* doctrine,[58] that the words "attorneys' fees" are not "magic words" [59] that Congress must use to satisfy the requirement that the waiver be "specific, if not explicit." [60] On the basis of such close precedent, as well as common sense, we believe that "interest" is not a "magic word" the recital of which is prerequisite to a waiver of sovereign immunity respecting the interest component of an attorneys' fee award. Surely if Congress were to enact a comprehensive and unambiguous statute abrogating entirely

[56] See *Nardone* v. *United States*, 302 U.S. 379, 383, 58 S.Ct. 275, 277, 82 L.Ed. 314, 317 (1937); *United States* v. *California*, 297 U.S. 175, 186-187, 56 S.Ct. 421, 425, 80 L.Ed. 567, 574 (1936).

[57] *Kennedy* v. *Whitehurst*, 223 U.S.App.D.C. 228, 690 F.2d 951 (1982).

[58] See *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975).

[59] *Kennedy* v. *Whitehurst, supra* note 57, 223 U.S.App.D.C. at 229, 690 F.2d at 962, citing *Fitzgerald* v. *United States Civil Serv. Comm'n*, 180 U.S.App.D.C. 327, 330 & n.8, 554 F.2d 1186, 1189 & n.8 (1977). Accord *Smith* v. *Califano*, 446 F.Supp. 530, 533 (D.D.C. 1978).

[60] *Kennedy* v. *Whitehurst, supra* note 57, 223 U.S.App.D.C. at 240, 690 F.2d at 963. The standard by which language assertedly waiving governmental immunity from liability for interest will be judged as express or not has been described as "specific[]," e.g., *United States* v. *Goltra, supra* note 35, 312 U.S. at 207, 61 S.Ct. at 490, 85 L.Ed. at 780, and "explicit," e.g., *Fitzgerald* v. *Staats*, 188 U.S.App.D.C. 193, 198, 578 F.2d 435, 440, *cert. denied*, 439 U.S. 1004, 99 S.Ct. 616, 58 L.Ed.2d 680 (1978). The similar if not identical standard utilized in *Kennedy* renders it directly on point.

and for all purposes the sovereign-immunity doctrine, we would not resuscitate the United States' immunity with respect to interest merely because Congress did not specifically enumerate "interest." Rather, we would construe such a provision as an express waiver of interest immunity and implement it accordingly, and in reality we do no more here.

We underscore our more general view that an insightful approach to the problem before us is undermined, if not entirely precluded, by logomachic applications of the interest rule. Courts bear this observation out by consistently avoiding a wooden or formulaic definition of express waiver when referring to the interest rule. This circuit itself has declined to fashion a rigid concept of express waiver,[61] and the courts have not perceived a need to establish any particular verbal formulation thereof. Rather, they have variously required, if anything at all,[62] an "express" [63] waiver, a "clearcut" [64] waiver, a "specific" [65] waiver, an "explicit" [66] waiver, an "unequiv-

---

[61] *Blake* v. *Califano*, *supra* note 32, 200 U.S.App.D.C. at 30, 626 F.2d at 894.

[62] On occasion, courts have not specified any particular standard by which statutory waivers of immunity will be regarded as express or not. E.g., *National Home for Disabled Volunteer Soldiers* v. *Parrish*, 229 U.S. 494, 496, 33 S.Ct. 944, 945, 57 L.Ed. 1296, 1299 (1913); *United States* v. *Maryland*, 121 U.S.App.D.C. 258, 259, 349 F.2d 693, 694 (1965).

[63] E.g., *United States* v. *Alcea Band of Tillamooks*, *supra* note 35, 341 U.S. at 49, 71 S.Ct. at 552, 95 L.Ed. at 739.

[64] E.g., *United States* v. *Thayer-West Point Hotel Co.*, *supra* note 34, 329 U.S. at 590, 67 S.Ct. at 400, 91 L.Ed. at 526.

[65] E.g., *Albrecht* v. *United States*, 329 U.S. 599, 605, 67 S.Ct. 606, 609, 91 L.Ed. 532, 539 (1947).

[66] E.g., *United States* v. *North Carolina*, 136 U.S. 211, 219, 10 S.Ct. 920, 923, 34 L.Ed. 336, 339 (1890).

ocal" [67] waiver, a "plain" [68] waiver, a "manifest" [69] waiver, an "affirmative" [70] waiver, an "unambiguous" [71] waiver, or a waiver described by a combination of these adjectives. There is nothing talismanic in the word "express," [72] and we would distort the interest rule were we to inform its application by resort to any intuitive call for clarity of legislative expression thought peculiarly to lurk in the recesses of the word, or any other term used analogously as an ostensible criterion by which claimed waivers are to be judged. Rather, our use of the interest rule is instructed more appropriately by reference to the touchstone of the sovereign-immunity doctrine: "that the liability of the United States . . . is a matter of federal law, and its extent and the procedures for imposing it must be sought in the statutes." [73] The Su-

---

[67] E.g., *Fitzgerald* v. *Staats*, *supra* note 60, 188 U.S.App. D.C. at 196, 578 F.2d at 438, quoting *United States* v. *Testan*, 424 U.S. 392, 399, 96 S.Ct. 948, 954, 47 L.Ed.2d 114, 121 (1976).

[68] E.g., *Blake* v. *Califano*, *supra* note 32, 200 U.S.App.D.C. at 29, 626 F.2d at 893.

[69] E.g., *United States* v. *North Carolina*, *supra* note 66, 136 U.S. at 216, 221, 10 S.Ct. at 922, 924, 34 L.Ed. at 338, 340.

[70] E.g., *United States* v. *New York Rayon Importing Co.*, 329 U.S. 654, 659, 67 S.Ct. 601, 604, 91 L.Ed. 577, 582 (1947).

[71] E.g., *United States* v. *Thayer-West Point Hotel Co.*, *supra* note 34, 329 U.S. at 590, 67 S.Ct. at 400, 91 L.Ed. at 526.

[72] Cf. *Towne* v. *Eisner*, 245 U.S. 418, 425, 38 S.Ct. 158, 159, 62 L.Ed. 372, 376 (1918) ("[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used").

[73] 1 J. Moore, J. Lucas, H. Fink, D. Weckstein & J. Wicker, Moore's Federal Practice ¶ 0.65[2.-1] at 700.88 (2d ed. 1984) (footnote omitted).

preme Court has echoed this view, declaring that the standard for gauging asserted waivers of sovereign immunity as express or not is whether the statute "can fairly be interpreted" as mandating governmental liability.[74] Giving this counsel the respect it is due, we think a disclaimer of waiver here would impart to the concept of express waiver an understanding more limited and formalistic than necessary to achieve the objectives underlying the interest rule.

This conclusion is reinforced by the resolve of several courts, recognizing the need for perspective when applying the rule requiring strict construction of sovereign-immunity waivers, to vigorously resist the tendency of the rule to become increasingly demanding by force of its own inertia.[75] As one court has put it,

---

[74] *United States* v. *Testan*, *supra* note 67, 424 U.S. at 400, 96 S.Ct. at 954, 47 L.Ed.2d at 122, quoting *Eastport S.S. Corp.* v. *United States*, 372 F.2d 1002, 1009 (Ct. Cl. 1967). See also *Cohen* v. *United States*, 195 F.2d 1019, 1021 (2d Cir. 1952) (despite rule of strict construction, "the overriding consideration is that the intent of Congress, where that can be determined, must be given effect").

[75] "It is a rule, firmly established beyond debate, that any purported grant by a sovereign is to be strictly construed . . .; yet it must be construed, not emasculated. There is wisdom in the rule that in examining a grant by the sovereign, if the words can without distortion be understood broadly or narrowly, they are to be taken in the more limited sense; but it would be an abuse of this rule to search for subtleties in an effort to defeat a grant, however phrased, when its meaning is self evident." *United States* v. *Smoot Sand & Gravel Corp.*, 248 F.2d 822, 827 (4th Cir. 1957) (citation omitted). Accord, *United States* v. *California*, *supra* note 56, 297 U.S. at 186-187, 56 S.Ct. at 425, 80 L.Ed. at 574 ("[l]anguage and objectives so plain are not to be thwarted by resort to a rule of construction whose purpose is but to resolve doubts, and whose application in the circumstances would be highly artificial");

the strict-construction rule "is not entitled to be made a judicial vise to squeeze the natural and obvious import out of . . . a statute or to sap its language of its normal and sound legal meaning."[76] The Supreme Court has reiterated the essence of this view:

> The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced.[77]

When dealing with the interest rule, we see as much need for perspective to avoid strangulation of legislative intent by an unwarranted use of judicial force.[78] We think Congress spoke clearly enough

---

Navajo Tribe v. *United States*, 586 F.2d 192, 201 (Ct. Cl. 1978), *cert. denied*, 441 U.S. 944, 99 S.Ct. 2163, 60 L.Ed.2d 1046 (1979) ("[i]t has never been the rule that consents-to-suit must be given the narrowest possible scope or that legislation granting jurisdiction of actions against the sovereign must be read apart from history, legislative purpose, or the dictates of commonsense") (footnote omitted). See generally *Miller* v. *Robertson*, 266 U.S. 243, 248, 45 S.Ct. 73, 75, 69 L.Ed. 265, 271 (1924); *Moore* v. *United States*, 249 U.S. 487, 489, 39 S.Ct 322, 323, 63 L.Ed. 721, 722 (1919); *United States* v. *Temple*, 105 U.S. 97, 99, 26 L.Ed. 967, 968 (1882).

[76] *Herren* v. *Farm Sec. Admin.*, 153 F.2d 76, 78 (8th Cir. 1946).

[77] *United States* v. *Aetna Cas. & Sur. Co.*, 338 U.S. 366, 383, 70 S.Ct. 207, 216, 94 L.Ed. 171, 186 (1949), quoting *Anderson* v. *John L. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926).

[78] The interest rule, like the strict-construction rule, promotes the general policy confining immunity waivers by a legislative enactment to wholly appropriate situations. See text *infra* following note 115.

when, with respect to attorneys' fees, it ordained for the United States a liability "the same as a private person." [79] We hold that Congress thereby waived the immunity of the United States from liability for interest as part of a reasonable attorneys' fee.

V

Even were we to find Title VII's attorneys'-fee section inadequate as an express waiver, we would affirm the District Court's fee award on the basis of a substantial body of caselaw relaxing the traditional rigor of the sovereign-immunity doctrine when a statute measures the liability of the United States by that of private persons. The doctrine espoused by these cases, while spanning numerous and diverse statutory schemes, has attained prominence in litigation under the Suits in Admiralty Act.[80] It is, accordingly, with this legislation that we commence our examination of the doctrine for purposes of ascertaining its applicability to the case at bar.

As originally framed, the Act provided that the United States could be held liable for harm inflicted by its merchant vessels "[i]n cases where if such vessel were privately owned or operated, or if such cargo were privately owned or possessed, a proceeding in admiralty could be maintained." [81] Congress later amended the Act by adding, as a third clause,

---

[79] 42 U.S.C. § 2000e-5(k) (1982), quoted in text *supra* at note 45.

[80] Act of Mar. 9, 1920, ch. 95, 41 Stat. 525 (codified as amended at 46 U.S.C. §§ 741-752 (1982)).

[81] Suits in Admiralty Act, § 2, 41 Stat. 525 (1920) (codified as amended at 46 U.S.C. § 742 (1982)) [hereinafter cited as codified].

the phrase "or if a private person or property were involved," [82] thus underscoring the Act's plain command that governmental liability in admiralty be equivalent to that of private persons in similar circumstances.[83] Federal courts have interpreted this language broadly to effectuate the congressional purpose evident therefrom.[84] The Supreme Court has explicitly rejected application of the customary rule of

---

[82] Act of Sept. 13, 1960, Pub. L. No. 86-770, § 3, 74 Stat. 912 (codified at 46 U.S.C. § 742 (1982)).

[83] Early cases read this provision as extending to all suits in admiralty in derogation of statutory limitations imposed by concomitant admiralty legislation. E.g., *Roberts* v. *United States*, 498 F.2d 520, 525-526 (9th Cir.), *cert. denied*, 419 U.S. 1070, 95 S.Ct. 656, 42 L.Ed.2d 665 (1974); *National Union Fire Ins. Co.* v. *United States*, 436 F.Supp. 1078, 1080 (M.D. Tenn. 1977). Although the Supreme Court, in *United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 96 S.Ct. 1319, 47 L.Ed.2d 653 (1976), overturned these precedents in order to preserve the efficacy of the threatened statutes, it did so by ordinary rather than strict construction of the Act. *Id.* at 170-181, 96 S.Ct. at 1323-1329, 47 L.Ed.2d at 659-665. In no respect has the Court departed from *Nahmeh* v. *United States*, 267 U.S. 122, 45 S.Ct. 277, 69 L.Ed. 536 (1925), and its progeny, holding that the Act's waiver of sovereign immunity is to be liberally construed. See text *infra* at notes 84-85.

[84] See *Grillea* v. *United States*, 232 F.2d 919, 921 (2d Cir. 1956) ("the Suits in Admiralty Act is not to be construed with the same jealously that ordinarily circumscribes the consent of the United States to be sued"). See also *Malgren* v. *United States*, 390 F.Supp. 154, 156 (W.D. Mich. 1975); *Marich* v. *United States*, 84 F.Supp. 829, 832 (N.D. Cal. 1949). Courts have not entirely abandoned the strict-construction rule, however; they have continued to apply it with respect to conditions placed by Congress upon waivers of immunity. See, e.g., *United States* v. *M/V Pitcairn*, 272 F.Supp. 518, 522 (E.D. La. 1967).

strict construction and held instead that "[t]hese liberal provisions indicate that the language used in the [Act] should have its broad and ordinary meaning and should not be interpreted in a restricted . . . sense." [85]

Later decisions by other federal courts have reiterated the theme that Congress intended, and that the Act should accordingly be interpreted, to make governmental liability "coextensive" with that of private parties.[86] They have rebuffed attempts to inject "unintended" or "irrational" [87] refinements into the Act, and have construed the language "sensibly, naturally, [and] . . . literally." [88] One court has even held that the United States is liable as a private person in new causes of action imported into admiralty law subsequent to passage or amendment of the Act.[89] In short, federal courts generally have refused to wield the rule of strict construction to defeat the

---

[85] *Nahmeh* v. *United States, supra* note 83, 267 U.S. at 126, 45 S.Ct. at 278, 69 L.Ed. at 538.

[86] *De Bardeleben Marine Corp.* v. *United States,* 451 F.2d 140, 143 (5th Cir. 1971). See also *Canadian Pac. (Bermuda), Ltd.* v. *United States,* 534 F.2d 1165, 1168 (5th Cir. 1976); *De Bardeleben Marine Corp.* v. *United States, supra,* 451 F.2d at 145; *Gulf Oil Corp.* v. *Panama Canal Co.,* 407 F.2d 24, 28 (5th Cir. 1969); *Maritime Overseas Corp.* v. *United States,* 433 F.Supp. 419, 421 (N.D. Cal. 1977); *Universe Tankships, Inc.* v. *United States,* 388 F.Supp. 276, 285 (E.D. Pa. 1974), *aff'd,* 528 F.2d 73 (3d Cir. 1975).

[87] *De Bardeleben Marine Corp.* v. *United States, supra* note 86, 451 F.2d at 146. See also *id.* at 145-146.

[88] *Gulf Oil Corp.* v. *Panama Canal Co., supra* note 84, 407 F.2d at 28.

[89] *Malgren* v. *United States, supra* note 84, 390 F.Supp. at 157.

plain and natural meaning of the Act's command that liability of the United States be identical to that of private counterparts.[90]

Buttressing the exception to the strict-construction rule prevalent in Suits in Admiralty Act cases, federal courts also have liberally construed other similarly broad statutory waivers of sovereign immunity. For example, the Federal Torts [*sic*] Claims Act [91] waives the immunity of the United States in unqualified language, imposing upon it liability for certain kinds of tortious conduct "to the same extent as a private individual under like circumstances." [92] The Supreme Court has placed liability on the United States for activities which, as a practical matter, are never privately undertaken because it has felt compelled to implement the "broad and just purpose which the statute was designed to effect," [93] namely, to treat the government as any private person would be treated. Similarly, when the question arose whether the Act allowed the United States to be sued as a third-party defendant in an action for contribution initiated by a joint tortfeasor, the Court refused to

---

[90] *Boston Sand & Gravel Co.* v. *United States,* 278 U.S. 41, 49 S.Ct. 52, 73 L.Ed. 170 (1928), however, held that a special act of Congress providing for governmental liability in an admiralty action "as in like cases . . . between private parties" did not authorize an award of pre-judgment interest, because specific legislative history indicated that Congress had not intended to allow interest under this statute. *Id.* at 47, 49 S.Ct. at 53, 73 L.Ed. at 176.

[91] 28 U.S.C. §§ 2671 *et seq.* and other scattered sections of 28 U.S.C. (1982).

[92] 28 U.S.C. § 2674 (1982).

[93] *Indian Towing Co.* v. *United States,* 350 U.S. 61, 68-69, 76 S.Ct. 122, 126, 100 L.Ed. 48, 55 (1955).

read "fine distinctions" into the Act.[94] Far from accepting a rule of strict construction, it specifically rejected an attempt to restrict the scope of the Act's broad language, which clearly put the United States on the same footing as a private party.[95] The Court quoted favorably a statement to which we earlier adverted:[96] "[t]he exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced."[97]

This same broad construction has been brought to bear on the Public Vessels Act,[98] which provides that "[a] libel in personam in admiralty may be brought against the United States . . . for damages caused by a public vessel of the United States."[99] It too has been given the interpretation borne by the plain and ordinary meaning of its language.[100] Though this

---

[94] *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 549, 71 S.Ct. 399, 404, 95 L.Ed. 523, 530 (1951).

[95] *Id.*

[96] See text *supra* at note 77.

[97] *United States* v. *Yellow Cab Co.*, *supra* note 94, 340 U.S. at 554, 71 S.Ct. at 406-407, 95 L.Ed. at 532, quoting *Anderson* v. *John L. Hayes Constr. Co.*, *supra*, note 77, 243 N.Y. at 147, 153 N.E. at 29-30. See also *United States* v. *Aetna Sur. Co.*, *supra* note 77, 338 U.S. at 383, 70 S.Ct. at 216, 94 L.Ed. at 186, quoting *Anderson* v. *John L. Hayes Constr. Co.*, *supra* note 77, 243 N.Y. at 147, 153 N.E. at 29-30.

[98] Act of Mar. 23, 1925, ch. 428, 43 Stat. 1112 (codified at 46 U.S.C. §§ 781-790 (1982)).

[99] *Id.* § 1 (codified at 46 U.S.C. § 781 (1982)).

[100] E.g., *Ira S. Bushey & Sons* v. *United States*, 398 F.2d 167, 169 (2d Cir. 1968); *Allen* v. *United States*, 338 F.2d 160,

provision is less explicit than those of the Suits in Admiralty and Tort Claims Acts with respect to the comparative responsibilities of the United States and private persons, the Supreme Court has interpreted it "to impose on the United States the same liability . . . as is imposed by the admiralty law on the private shipowner,"[101] noting that "congressional adoption of broad statutory language authorizing suit was deliberate and is not to be thwarted by an unduly restrictive interpretation."[102] The Court has since reaffirmed this holding,[103] and federal courts generally have construed the scope of governmental liability under the Public Vessels Act in terms similar if not identical to those by which they have delineated liability under the Suits in Admiralty Act.[104] A recent Supreme Court decision interprets and reconciles these statutes without recourse to or even mention of the strict-construction rule.[105]

Another example is furnished by the recent Equal Access to Justice Act, a statute strikingly similar to

---

162 (9th Cir. 1964), *cert. denied*, 380 U.S. 961, 85 S.Ct. 1104, 14 L.Ed.2d 152 (1965); *Jentry* v. *United States*, 73 F.Supp. 899, 902 (S.D. Cal. 1947).

[101] *Canadian Aviation, Inc.* v. *United States*, 324 U.S. 215, 228, 65 S.Ct. 639, 646, 89 L.Ed. 901, 910 (1945).

[102] *Id.* at 222, 65 S.Ct. at 643, 89 L.Ed. at 907.

[103] *Weyerhaeuser S.S. Co.* v. *United States*, 372 U.S. 597, 600, 83 S.Ct. 926, 928, 10 L.Ed.2d 1, 4 (1963).

[104] E.g., *Gulf Oil Corp.* v. *Panama Canal Co.*, *supra* note 86, 407 F.2d at 28; *Malgren* v. *United States*, *supra* note 84, 390 F.Supp. at 156; *Weiss* v. *United States*, 168 F.Supp. 300, 301 (D.N.J. 1958).

[105] *United States* v. *United Continental Tuna Corp.*, *supra* note 83.

the Title VII section here at issue in its provision that the United States shall be liable for reasonable attorneys' fees and expenses "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award." [106] While one circuit has found that this provision does not permit the award of interest,[107] others have declared categorically that the United States' liability thereunder is the same as private-party liability,[108] and generally have interpreted the statutory language to effect its "plain, clear and common meaning." [109] In light of the extension of such similar doctrine to such a variety of statutes,[110] it cannot reasonably be disputed

[106] Act of Oct. 21, 1980, Pub. L. No. 96-481, 94 Stat. 2325 (codified at 28 U.S.C. § 2412(b) (1982)).

[107] See *Arvin* v. *United States*, No. 83-5555 (11th Cir. Sept. 27, 1984).

[108] E.g., *Papson* v. *United States*, No. 602-80T (Ct. Cl. Apr. 28, 1982); *WATCH* v. *Harris*, 535 F.Supp. 9, 14 (D. Conn. 1981); *Photo Data, Inc.* v. *Sawyer*, 533 F.Supp. 348, 350 (D.D.C. 1982).

[109] *Photo Data, Inc.* v. *Sawyer*, *supra* note 108, 553 F.Supp. at 350. At least one circuit has noted that the Act constitutes "a significant relaxation of sovereign immunity in actions seeking attorney fees from the United States," *Commissioners* v. *United States*, 684 F.2d 443, 444 (7th Cir. 1982), and other courts likewise have accorded the terms of the statute their ordinary and reasonable meaning, e.g., *WATCH* v. *Harris*, *supra* note 108, 535 F.Supp. at 13-14; *Berman* v. *Schweiker*, 531 F.Supp. 1149, 1151 (N.D. Ill. 1982), *aff'd*, 713 F.2d 1290 (7th Cir. 1983).

[110] In addition to the cases already discussed, see *The Lake Monroe*, 250 U.S. 246, 254-255, 39 S.Ct. 460, 463, 63 L.Ed. 962, 967 (1919) (holding that a statutory waiver of immunity, which provided that merchant vessels bought or leased by the

that the numerous decisions articulating this exception represent not scattered and aberrant caselaw, but a well-established and coherent line of precedent.[111]

Shipping Board "shall be subject to all laws, regulations, and liability governing merchant vessels," Shipping Board Act, § 9, ch. 451, 39 Stat. 730 (1916), rendered these vessels amenable "to the same duties and liabilities as privately owned merchant vessels").

[111] This proposition is further buttressed by the many decisions relaxing the standard of strict construction traditional under the sovereign-immunity doctrine in cases involving federal instrumentalities statutorily authorized "to sue and be sued." The Supreme Court has sustained this departure from the doctrine at least partly in the view that the United States, when acting as an ordinary person or businessman, should be amenable to the normal incidents of litigation as a private party would be. See *Standard Oil Co.* v. *United States*, 267 U.S. 76, 79, 45 S.Ct. 211, 212, 69 L.Ed. 519, 521 (1925). The Court has endorsed this exception even as applied to corporations or instrumentalities not explicitly empowered to sue and be sued, see *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 389, 59 S.Ct. 516, 518, 83 L.Ed. 784, 789 (1939), and has relied upon such authorization, when it has existed, as support for its conclusion that Congress intended that the governmental entity be treated as if a private party. See *FHA* v. *Burr*, 309 U.S. 242, 245, 60 S.Ct. 488, 490, 84 L.Ed. 724, 728-729 (1940). As the Court has noted, "the unqualified authority to sue and be sued placed [the Government] upon an equal footing with private parties as to the usual incidents of suits in relation to the payment of costs and allowances." *Reconstruction Fin. Corp.* v. *J.G. Menihan Corp.*, 312 U.S. 81, 85-86, 61 S.Ct. 485, 487, 85 L.Ed. 595, 598 (1941). For these reasons, the Court has discarded the rigorous standards of the sovereign-immunity doctrine and admonished that such an authorization is to be "liberally construed." *United States* v. *Shaw*, 309 U.S. 495, 501, 60 S.Ct. 659, 661, 84 L.Ed. 888, 892 (1940). The proposition for which these cases stand is that a federal entity, intended by Congress to act or be treated

We think our approach in this case is fully consistent with the purposes of the rule of strict construction. This rule serves as a tool to calibrate judicial interpretation of purported waivers of sovereign immunity so as to minimize the risk of erroneous imposition of governmental liability under statutes that are ambiguous in scope, or are otherwise susceptible to expansion beyond the boundaries contemplated by Congress.[112] Strict construction thus ensures that any waiver of sovereign immunity will be a legislative and not a judicial act.[113] When, however,

---

as a private party, should be subject to all of the ordinary incidents of litigation pursuant to a broad construction of the relevant statutory waiver of immunity from suit. Especially in light of the Court's extension of governmental liability to include an award of interest, see *Standard Oil Co.* v. *United States, supra,* we are convinced that this line of precedent strongly supports our decision to construe the Title VII provision here at issue according to the plain and ordinary meaning of its language. See text *infra* at notes 118-120.

[112] Cf. *United States* v. *California, supra* note 56, 297 U.S. at 186, 56 S.Ct. at 425, 80 L.Ed. at 574 (justifying another rule of strict construction—that the sovereign was not intended to be bound by its own statute unless named in it—as "an aid to consistent construction of statutes of the enacting sovereign when their purpose is in doubt").

[113] See text *supra* at notes 61-74; see also *Navajo Tribe* v. *United States, supra* note 75, 586 F.2d at 200-201. Several courts have so framed the strict-construction requirement complementing the interest rule that only an extension of governmental liability beyond the plain and literal language of the authorizing statute is proscribed. E.g., *Price* v. *United States,* 174 U.S. 373, 375-376, 19 S.Ct. 765, 766, 43 L.Ed. 1011, 1013 (1899). In other cases, often involving the interest rule, disallowance of governmental liability was attributable to a reluctance to read a specific basis of liability into vague or general statutory language. E.g., *Blake* v. *Califano, supra*

Congress proclaims that the liability of the United States shall be the same as for a comparably-situated private individual—by enacting either an explicit provision to that effect or a sweeping waiver of immunity—the strict-construction rule poses a grave threat to effectuation of congressional purpose, and hence it should not be and is not applied. In such cases, courts interpret the waiver according to the plain and ordinary meaning of its language. The strict construction rule does not authorize judges to act as "self-constituted guardian[s] of the Treasury [to] import immunity back into a statute designed to limit it." [114]

Having determined that the doctrine we invoke constitutes a purposeful as well as an entrenched exception to the strict-construction rule, it remains only to consider whether the interest rule cedes a similar exception in cases involving statutes such as the Title VII section here under scrutiny. We conclude that it does, notwithstanding that almost all decisions articulating the doctrine have done so solely at the expense of the strict-construction rule.

Apart from the absence of caselaw contradicting or disallowing application of the doctrine in interest-rule cases, the Supreme Court's decision in *Standard*

---

note 32, 200 U.S.App.D.C. at 30, 626 F.2d at 894. These separate lines of cases, abjuring both liberal judicial construction of unclear statutory provisions and judicial extension of liability beyond the plain boundaries of statutory language, are both aspects of the more general policy containing assessments of governmental liability not already marked out by legislative action. Neither, however, mandates reversal of the order on appeal. See note 42 *supra.*

[114] *Indian Towing Co.* v. *United States, supra* note 93, 350 U.S. at 69, 76 S.Ct. at 126, 100 L.Ed. at 56.

Oil Company v. *United States* [115] adds weight to the conclusion that the principle of liberal construction applies as much to the interest rule as it does to other manifestations of sovereign immunity. There the Court held the United States liable for interest despite the absence of an express waiver therefor, and solely on the ground that by acting as a private insurer it had without more consented to be treated as a private insurer.[116] This rationale bears a close resemblance to that underpinning the exception at issue, thus counseling inclusion of the interest rule within its ambit. We recognize, too, that the interest and strict-construction rules achieve similar objectives within the realm of sovereign immunity. Each operates hand-in-glove with the general rule that the United States cannot be held monetarily liable without its consent. The interest rule ensures that the United States will incur liability for interest only at the will of Congress, while the strict-construction principle operates similarly, though more broadly, to curtail judicial extension of governmental liability beyond the range of likely congressional intent. Consequently, just as the strict-construction rule is obviated by statutes effecting sweeping waivers of immunity or otherwise equating governmental liability

[115] *Supra* note 111.

[116] 267 U.S. at 79, 45 S.Ct. at 212, 69 L.Ed. at 521 ("[w]hen the United States went into the insurance business, issued policies in familiar form and provided that in case of disagreement it might be sued, it must be assumed to have accepted the ordinary incidents of suits in such business"). The Court has refused, however, to relax the interest rule in cases in which the United States, though serving as an insurer, has not acted as a private insurer. See *United States* v. *Worley*, 281 U.S. 339, 341-342, 50 S.Ct. 291, 292-293, 74 L.Ed. 887, 889-891 (1930).

with that of private persons, so do we decline to use the interest rule in the case at bar as an instrument for insertion of unintended qualifications and refinements into an otherwise plain and unambiguous statutory mandate.

The applicability of this doctrine in interest-rule cases thus established, we must, finally, determine whether the statutory provision upon which the District Court grounded its assessment of the disputed attorneys' fee against the United States fits within the confines of the exception, and we hold that it does. When Congress declared that "the United States shall be liable for costs the same as a private person," it revealed unmistakably its intention to subject the United States to treatment no different from that accorded private parties in equivalent circumstances. Title VII's attorneys'-fee provision thus measures the waiver of immunity in terms essentially identical to those in statutes already held to be governed by the doctrine.[117] We conclude, as a result, that the contours of this mandate must be delineated by ordinary and reasonable, not express or strict, judicial construction.

Under such an interpretation, we think it manifest that the attorneys'-fee section implements the overarching congressional purpose to accord " '[a]ggrieved [federal] employees or applicants . . . the full rights available in the courts as are granted to individuals in the private sector under title VII' " [118]

[117] We need not decide whether the statutory provision at issue also falls within the exception for "sweeping" waivers of immunity.

[118] *Chandler* v. *Roudebush*, 425 U.S. 840, 841, 96 S.Ct. 1949, 1950, 48 L.Ed.2d 416, 420 (1976) (quoting S. Rep. No. 415, 92d Cong., 1st Sess. 16 (1971)). See also H.R. Rep. No. 238,

Since claimants in private-sector Title VII cases may garner interest as one component of an attorneys'-fee award—itself defined as a part of "costs" [119]—we cannot sanction a variant doctrine of liability for the United States. We find that the District Court did not err when it fashioned an assessment of interest against the United States.[120]

92d Cong., 1st Sess. 23 (1971); 118 Cong. Rec. 4922 (1972) (remarks of Senator Williams); *Copeland* v. *Marshall, supra* note 2, 205 U.S.App.D.C. at 405, 641 F.2d at 895.

[119] See note 46 *supra*.

[120] Our dissenting colleague says that our holding creates a statutory anomaly by treating Title VII lawyers better than their federal-sector clients inasmuch as interest would be payable as part of attorneys'-fee awards but, under *Blake* v. *Califano, supra* note 32, not on backpay awards. See Dis. Op. at 6. We find this argument unpersuasive for several reasons. First, we cannot treat the interests of Title VII lawyers and clients as anything other than mutually dependent. Our holding ensures that Title VII claimants will better be able to compete for the time and energies of more experienced counsel, *Copeland* v. *Marshall, supra* note 2, 205 U.S.App.D.C. at 405, 641 F.2d at 895, and thus furthers the interests of clients in the most effective representation of their claims. Second, the supposed anomaly is attributable to the interest rule itself and its diverse operation in the context of the statute, a problem which Congress apparently did not anticipate. Lastly, a different holding would create its own anomaly—that private-sector clients, whose lawyers can obtain interest adjustments to lodestar amounts, see note 46 *supra*, would receive better treatment than federal-sector clients, a result clearly at odds with the fundamental objective of the Equal Employment Opportunity Act of 1972 to establish parity between federal and private-sector employees. See *Chandler* v. *Roudebush, supra* note 118, 425 U.S. at 841, 96 S.Ct. at 1949, 48 L.Ed.2d at 420 (quoting S. Rep. No. 415, 92d Cong., 1st Sess. 16 (1971)). It would seem strange indeed to wield the interest rule in contravention of a natural reading of the attorneys' fee section simply to ensure that interest is defeated equally for attorneys' fees as for backpay.

VI

We affirm, on the alternative grounds explicated, the District Court's decision to allow a 30 percent upward adjustment in the lodestar to compensate counsel for the delay in receipt of payment for the legal services he rendered under Title VII. We modify the court's order to correct a mathematical error in its computation of the lodestar,[121] and remand solely in order that the court may confirm that Shaw's counsel is not being paid twice for the delay he experienced.[122] If, in calculating the lodestar for counsel's services, the court utilized an hourly rate which reflected a reasonable charge to clients who pay their attorneys when billed, the court's order as modified will stand, and the Library must remit to counsel $2,524.50, the portion of the court's attorney's-fee award contested on appeal.[123] If, instead, the lodestar was based on a reasonable hourly rate for services rendered under a fee-shifting statute, that rate has already taken into account the pecuniary disadvantage resulting from the lengthy wait for payment, and the court's upward adjustment to the lodestar therefore was inappropriate since it would result in double payment for the delay in receiving his money.

So ordered.

---

[121] See note 17 *supra*.

[122] See note 28 *supra*.

[123] See note 24 *supra*.

GINSBURG, *Circuit Judge, dissenting*: In my view, precedent constrains judicial inventiveness in this case more tightly than my colleagues acknowledge. Furthermore, I believe today's decision will confound, not assist, district court judges as they labor to fathom and follow this court's proliferating instructions regarding allowance of attorneys' fees against the United States. I therefore dissent from the majority's position on the government's liability for interest.

On September 9, 1982, when we heard oral argument on appeal, we faced, and our charge was to reconcile, two not fully consistent lines of decision. One line, long-established, forbids the award of pre- or post-judgment interest payable by the United States, absent deliberate waiver by Congress of the sovereign's immunity. *See Holly v. Chasen*, 639 F.2d 795 (D.C. Cir.), *cert. denied*, 454 U.S. 822 (1981); *Blake v. Califano*, 626 F.2d 891 (D.C. Cir. 1980), and decisions cited therein. The other, newer line contemplates an adjustment for delay in receipt of payment when counsel fees are awarded, pursuant to statute, as part of costs. *See Copeland v. Marshall*, 641 F.2d 880, 893, 906 n.61 (D.C. Cir. 1980) (en banc); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319, 1328-29 (D.C. Cir. 1982). The difference between interest and a delay factor can be more than semantic. Interest, as that term is commonly used, is calculated retrospectively, at the completion of the period during which it accrues. A delay factor, as *Copeland* suggests, may figure as a contingency adjustment, applied prospectively to the lodestar. Just as an attorney setting an hourly rate in a contingent fee case may factor in the risk that the cause may not prevail, so too an

attorney embarking on services for which he or she anticipates payment ultimately, but not promptly, may factor in the expected delay.

When a statute provides for payment of an attorney's fee by a private sector defendant, there is no need to grapple with delay in payment as a factor distinct from interest, for private defendants are not immune from the payment of pre- or post-judgment interest.[1] When the sovereign is the payor, however, precedent we are not at liberty to upset demands disallowance of interest add-ons unless Congress otherwise orders.

Recently, in *Murray v. Weinberger*, No. 83-1680, slip op. at 16-19 (D.C. Cir. Aug. 24, 1984), a panel of this court attempted to chart a course between the interest-is-impermissible/delay-factor-is permissible lines of decision. *Murray*, argued on April 13, 1984, intercepted the instant case; it appeared to provide definitive instructions on the two inquiries the dis-

---

[1] Private sector decisions, when they adjust for the time of payment, grant interest *or* a delay factor, but not both. Decisions in private sector cases accepting some type of multiplicative lodestar adjustment to account for delay include: Brown v. Gillette Co., 536 F.Supp. 113, 123-24 (D.Mass. 1982); Black Gold, Ltd. v. Rockwool Indus., 529 F.Supp. 272 (D.Colo. 1981); Kennelly v. Lemoi, 529 F.Supp. 140, 144-45 (D.R.I. 1981). None of these decisions tacked on pre-judgment interest as well. At least one private sector Title VII decision allowed computation of the lodestar using current rather than historical hourly rates and did not otherwise adjust the lodestar for delay. Chrapliwy v. Uniroyal Inc., 509 F.Supp. 442, 457-58 (N.D.Ind. 1981), *aff'd in part and rev'd in part on other grounds*, 670 F.2d 760, 764 (7th Cir. 1982), *cert. denied*, 103 S.Ct. 2428 (1983); *cf.* Virginia Academy of Clinical Psychologists v. Blue Shield, 543 F.Supp. 126 (E.D.Va. 1982) (antitrust attorneys' fees calculation; court computed lodestar using current hourly rates).

trict court should make in ruling upon a request for a fee award adjustment to account for delay in payment. Under *Murray*, the court must determine first whether the rate incorporated in the lodestar already takes into account an anticipated time lag between rendition of services and receipt of payment. Second, if "the reasonable hourly rate incorporated into the lodestar did not reflect an increment for the expected delay in payment," the court should next inquire "whether recalculation of the lodestar utilizing current market rates instead of historic rates, is appropriate." *Id.* at 18. I do not find in the statute before us, 42 U.S.C. § 2000e-5(k) (1982), the conscious waiver of sovereign immunity entrenched decisional law contemplates. *See, e.g., Ruckelshaus v. Sierra Club*, 103 S.Ct. 3274, 3277 (1983), *cited in Nichols v. Pierce*, 740 F.2d 1249, 1256 nn.38, 42 (D.C. Cir. 1984) (courts must take care not to enlarge waiver of sovereign immunity beyond what language of statute *requires*); *In re: Hamilton Jordan*, No. 79-7, slip op. at 4 (D.C. Cir. Indep. Couns. Div. Oct. 16, 1984); *Phillips v. United States*, 346 F.2d 999, 1000 (2d Cir. 1965) ("spirit proper to judicial consideration" of alleged sovereign immunity waiver "is not one of generosity and broad interpretation"). I would therefore adhere to the letter of the *Murray* instructions and reject the large, "interest is permissible," postscript the majority espouses.

Although Congress has not provided for an interest add-on, and precedent does not place me at liberty to read into the statute an instruction or waiver Congress might have included had it thought about the matter, I am also bound by the more recent decisional line—opinions permitting delay factor supplementation of an attorney's fee, even when the fee is

payable by the sovereign. Our recent *Murray* opinion relieves me of the reconciliation task confronting the panel when this appeal was new. The adjustment *Murray* permits serves the "important objective" of "[e]ase of administration," *Murray*, slip op. at 18, and promises to simplify, not complicate, the chore we commit to the district court.[2] I would not go beyond *Murray* without a direction to do so from Congress.

I. The No-Interest Rule

Nothing in the majority's labyrinthian opinion genuinely demonstrates that Congress so much as adverted to the no-interest rule when it enacted the statute in question. For all its intricacy, the majority opinion builds on a hunch: if Congress had adverted to the matter, it would have (or should have) waived immunity. I sympathize with the policy judgment the majority advances. But I cannot agree that the legislature "plainly" resolved an immunity waiver issue never even framed in the course of its deliberations.

The delay calculation made by the district court, as the majority holds, was an interest computation. The district court applied a 10% per annum rate to the base award, determined that three years would separate the time when the fee should have been paid and its actual payment, and increased the award accordingly. This calculation resembles in all relevant respects the one our court disapproved in *Holly v. Chasen*.[3] In that case the interest rate employed was

---

[2] *See infra* pp. 14-17.

[3] Nor can I distinguish *Holly* based on the conduct of the government in the two cases. *Holly* did not reach the question whether a penalty, computed in the same manner as interest, could be imposed if the government exploited delay deliber-

6%, and the term over which interest was to accrue was indefinite, running from the judgment date to the date of payment. But the differences in the interest rates (10% versus 6%) and in the terms to which they were applied (three years versus an open-ended period) are not sufficient grounds for typing the award here as something other than interest. In both cases, augmentation of the award involved a *retrospective* calculation that placed upon the government the cost of an actual delay. A calculation of this order, by any name, is inescapably in the nature of "interest."

Contemporary conditions and equitable considerations cast doubt on the soundness of the no-interest rule governing judgments against the United States. The majority's painstakingly embroidered opinion is comprehensible only as a labor sparked by that doubt. This circuit recently has stated, however, that the entrenched character of the no-interest rule militates against alteration by the judiciary. Our court has maintained that change, in view of the long-prevailing, rigorously-applied rule, lies within the province of Congress. *See Holly v. Chasen*, 639 F.2d at 798.

In *Blake v. Califano*, we ruled that a Title VII back pay award against the government may not be augmented by pre-judgment interest. Similarly, the *Holly* court held that interest may not be added to an attorney's fee payable by the United States pursuant to the Freedom of Information Act, U.S.C.

---

ately to whittle down an award. Like *Holly*, the case before us reveals no design to shrink a fee. The district court found the delay in resolving the back pay controversy unnecessary, but it stated that the time lapse might have been avoided by more effective representation on either side of the case. Shaw v. Library of Congress, No. 79-0325, slip op. at 2 (D.D.C. Nov. 4, 1981).

§ 552(a)(4)(E) (1982). Both decisions underscore that waiver of the no-interest rule "cannot be by implication or by use of ambiguous language," *Holly v. Chasen*, 639 F.2d at 797; Congress, we have emphasized, must signal the authorization advertently and with clarity. *See Blake v. Califano*, 626 F.2d at 894-95 & n.7.[4] Invited to reconsider *Blake* and allow a Title VII plaintiff to recover pre-judgment interest on a back pay award against the federal government, we adhered to our prior holding and stated: "When Congress amended Title VII in 1972 to bring the federal government under its provisions, Congress evinced no intention to waive sovereign immunity as to interest awards." *Segar v. Smith*, No. 82-1541, slip op. at 80 (D.C. Cir. June 22, 1984).

Taken together, *Blake*, *Segar*, and today's decision announce that Congress distinguished sharply and consciously between attorneys for Title VII litigants against government defendants, and the litigants themselves, the actual victims of discrimination. An interest calculation can augment the attorney's fees, but not the client's recovery. The majority attributes this unusual design to Congress because it was the legislature's "overarching . . . purpose" to accord aggrieved federal employees the full Title VII rights available to individuals in the private sector. Majority opinion at 32. The right available to individuals in the private sector to claim interest on back pay awards, however, cannot be secured to federal employees in cases brought in this circuit without overruling *Blake*, and now the relevant *Segar* holding as well. The majority thus settles for second best. It

---

[4] *But see* Note, *Interest in Judgments Against the Federal Government: The Need for Full Compensation*, 91 YALE L.J. 297 (1981).

leaves the litigant without interest, takes care of the lawyer only, and pretends interest for the lawyer is in full harmony with *Blake* and *Segar*.

Client and lawyer are on the same footing vis-a-vis interest on Title VII awards in private sector employment, the majority concedes. A Congress that thought about the problem at all, I believe, would have placed client and lawyer on the same footing as to interest awards in the federal sector as well. Though the majority strives mightily, it cannot convincingly explain why Congress would deliberately opt to treat awards to clients and lawyers differently by allowing lawyers, but not clients, to collect interest.

The statute before us authorizes "a reasonable attorney's fee" as part of costs, and provides that the United States "shall be liable for costs the same as a private person." 42 U.S.C. § 2000e-5(k) (1982). The majority holds that the United States has thereby waived not only its immunity as to *costs* (in this instance, including attorneys' fees) for which Congress made express provision, but also, *sub silentio*, its immunity as to *interest on those costs*.[5] "Costs,"

---

[5] Although this case involves only pre-judgment interest, the logic of the majority opinion, riveted on the 42 U.S.C. § 2000e-5(k) words "the same as a private party," extends to post-judgment interest as well. In Title VII litigation, costs include attorneys' fees. According to 28 U.S.C. § 1920 (1982), "costs" are included in the judgment. Under 28 U.S.C. § 1961 (1982), a private defendant is liable for post-judgment interest on the amount of the "judgment." In combination, these two provisions render a private defendant liable for post-judgment interest on costs. *But cf. infra* note 7. If the United States is to be treated precisely as a private defendant, as the majority here argues, it follows that the United States is now exposed to both pre-judgment and post-judgment interest on Title VII attorneys' fee awards. Curiously, the majority's extended discussion leaves the reader at sea on this issue.

as treated in the majority's opinion, are thus accorded a uniquely expansive interpretation. It is established, for example, that a waiver of immunity with respect to a monetary award for discrimination in employment is not a waiver with respect to interest on that award. *Blake v. Califano.* Similarly, a waiver of immunity with respect to liability on a contract is not a waiver with respect to interest on that liability. *Eastern Service Management Co. v. United States*, 363 F.2d 729, 733 (4th Cir. 1966); *Economy Plumbing & Heating Co. v. United States*, 470 F.2d 585 (Ct. Cl. 1972). And in the adjustment of mutual claims, the government is entitled to interest on amounts owed to it, but is not obligated to pay interest on amounts it owes. *United States v. North American Transportation & Trading Co.*, 253 U.S. 330, 336 (1920).

Enlarging an immunity waiver with respect to "costs" to include interest on costs draws on nothing inherent in the concept of "costs." "Costs" is a term of specific and narrow content; in federal adjudication, the word "costs" has never been understood to include any interest component. *See* 28 U.S.C. § 1920 (1982); *see also* 10 C. WRIGHT, A. MILLER & M. KANE, FEDERAL PRACTICE AND PROCEDURE §§ 2666, 2670 (2d ed. 1983) (hereafter, WRIGHT & MILLER).

Pre-judgment interest (interest "on the claim") generally ranks as an element of damages, not as a component of "costs." *Id.* § 2664, at 159-60. Its availability depends on the substantive law (state or federal) that governs the controversy. *See General*

Motors Corp. v. Devex Corp., 103 S.Ct. 2058 (1983). *Post-judgment interest* (interest "on the judgment") is a separate entitlement governed by statue or common law, not a "cost." 10 WRIGHT & MILLER, *supra*, § 2664, at 159. I therefore fail to spy in a statute allowing "costs" and specifically qualifying an attorney's fee as part of "costs," a clear, affirmative intention by Congress to displace the traditional principle that the sovereign is immune from the payment of interest on those costs. *Cf. Parker v. Lewis*, 670 F.2d 249, 250 (D.C. Cir. 1982) (Title VII attorneys' fee awards against Secretary of Transportation should be determined with expedition because Secretary, "as an officer of the government, cannot be charged with interest") (citing *Holly v. Chasen*).

The majority maintains most insistently that in rendering the United States liable for costs (including attorneys' fees) "the same as a private person," Congress unquestionably intended to waive the sovereign's immunity with respect to interest on costs. *But see Arvin v. United States*, No. 83-5555 (11th Cir. Sept. 27, 1984) (Equal Access to Justice Act provision (28 U.S.C. § 2412(b) (1982)) that United States shall be liable for the reasonable fees and expenses of attorneys "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award" does *not* waive sovereign immunity with regard to interest on attorney fee awards).[6] Sparse case law is cited by the majority

[6] *Cf.* Boudin v. Thomas, 732 F.2d 1107, 1114-15 (2d Cir. 1984) (declining to extract from words "any civil action" in 28 U.S.C. § 2412(d)(1)(A) (1982) (Equal Access to Justice Act) congressional direction for United States payment of attorneys' fees in habeas corpus proceedings, although such

indicating that pre-judgment interest has been considered, on occasion, in determining the liability of private persons for attorneys' fees. *See* majority opinion note 46. The terse statutory phrase ("the same as a private person") on which the majority dominantly relies, coupled with sporadic and laconic judicial precedent in private sector cases,[7] simply do

proceedings rank as "civil actions" for other purposes—court stated that judicial finding of a waiver of the federal sovereign's immunity required "unequivocal and explicit" manifestation of the legislature's "affirmative intention," which "mere inclusion in the statute of the words 'any civil proceeding'" did not indicate).

If the statutory waiver here is "express" and "unmistakable," as the majority opinion at 14 bravely proclaims, it is remarkable that plaintiff-appellee, represented by able, experienced counsel, never argued that position. Instead, as the majority opinion at 9 initially acknowledged, plaintiff-appellee attempted to distinguish between "an award of interest and the adjustment of a fee to ensure that it is reasonable when there is delay in its payment." Brief for Plaintiff-Appellee at 10. The notion that the statute waives the sovereign's immunity as to interest, in short, entered this case, and has been exploited in it, as the majority's own invention.

[7] *See* cases cited *supra* note 1. In Title VII cases against private defendants the courts have no occasion to dwell on or even advert to the difference between a "delay factor" and "interest." Either can be ordered as part of a monetary award as a form of the equitable relief Title VII authorizes.

In litigation against the United States no distinction is appropriately made between interest on costs and interest on the underlying monetary award. An award of costs against the United States is included in the "judgment," 28 U.S.C. § 1920 (1982); payment of costs by the United States is addressed in 28 U.S.C. § 2412 (1982), which makes reference to 28 U.S.C. § 2517 (1982). Section 2517 refers only to "judgments" and interest thereon.

There was until recently, however, a circuit division on the question whether interest runs solely on the monetary award or on court costs included in the judgment as well. In Inde-

pendence Tube Corp. v. Copperweld Corp., 543 F.Supp. 706, 716 (N.D. Ill. 1982), the court summarized the division of authority, and its own conclusion, as follows:

> The plaintiff has requested interest on attorneys' fees and costs awarded to it. In *Capra* [*sic*], *Inc. v. Ward Foods, Inc.*, 567 F.2d 1316 (5th Cir. 1978), the court held that interest is not payable on attorneys' fees in antitrust cases because the Clayton Act makes attorneys' fees part of the court costs and interest is not payable on court costs, and because the treble damage award makes interest on attorneys' fees less necessary than in cases where treble damages are not awarded. 567 F.2d 1322. *Cf., Gates v. Collier*, 616 F.2d 1268 (5th Cir. 1980) (interest payable on attorneys' fees in civil rights cases). Other courts, however, albeit without discussion, have allowed payment of interest on costs and attorneys' fees in antitrust cases, *Mt. Hood Stages, Inc. v. The Greyhound Corp.*, 616 F.2d 394, 406 n.10 (9th Cir. 1980); *City of Detroit v. Grinnell Corp.*, 575 F.2d 1009, 1010 (2d Cir. 1979); *Perkins v. Standard Oil Co. of California*, 487 F.2d 672 (9th Cir. 1973). Furthermore, unlike the Fifth Circuit, the Seventh Circuit apparently does allow interest on costs. *See Harris v. Chicago Great Western Ry.*, 197 F.2d 829, 836 (7th Cir. 1952). Therefore, even if attorneys' fees are considered part of the costs rather than part of the judgment, interest on fees is appropriate.

Carpa, Inc. v. Ward Foods, Inc., cited by the *Copperweld* court for the "no interest on costs" position, has since been overruled. Copper Liquor, Inc. v. Adolph Coors Co., 701 F.2d 542 (5th Cir. 1983) (en banc). Either approach, however, supports my position. If costs (including attorneys' fees) are to be treated for interest purposes in the same way as the underlying monetary award, this circuit's holding in *Blake, supra*, reaffirmed in *Segar, supra*, compels us to deny prejudgment interest on attorneys' fees in Title VII cases. If costs (including attorneys' fees) are categorized separately and are subject to their own, discrete "no-interest" rule (a rule sparing even private defendants), as the now-overruled *Carpa* decision maintained, then it is of no help to appellee to argue that the statute provides for reimbursement "the same as against a private person."

not add up to the deliberate waiver of sovereign immunity that prior decisions emphatically require.[8] *Cf. Blake v. Califano*, 626 F.2d at 893-95 (in view of "specific entrenched immunity of the Government from prejudgment interest," court is not free to allow such interest in Title VII back pay awards to federal employees; Congress must evince specific intention to authorize waiver of "settled governmental immunity"; "mere consistency with [remedial policies of Title VII] is not enough").[9]

[8] Nor can I derive from Standard Oil Co. v. United States, 267 U.S. 76 (1925), featured in the majority opinion at 31, genuine support for the majority's view. There, the United States went into the business of insuring vessels against war risks, adopting the form of contract used by private underwriters, and reaping a large profit from the venture. *See* United States v. Worley, 281 U.S. 339, 342 (1930). The High Court soon clarified that *Standard Oil* was an exceptional case, turning on the commercial character of the insurance business in which the government was engaged, and is not a precedent appropriately extended outside its precise context. United States v. Worley, 281 U.S. at 341-44.

[9] Congress has several times waived the United States' immunity with respect to interest. *See, e.g.*, 28 U.S.C. § 2411 (1982) (expressly authorizing pre- and post-judgment interest payable by the United States in tax refund cases); *see also* 31 U.S.C. § 1304 (1982), *cited in Holly*, 639 F.2d at 797 as 31 U.S.C. § 724a (1976) (same statutory section before recodification). These provisions supply obvious models Congress might have followed had it considered waiving the sovereign's traditional immunity in the situation presented here.

Elsewhere Congress has reiterated the general rule that interest cannot be allowed against the United States absent *express* waiver. "Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof." 28 U.S.C. § 2516 (1982). "The United States shall be liable, respecting provisions of [the

The majority pushes beyond legitimate judicial license in stating that the interest issue here is "hardly one of first impression," and in insinuating that one might even decide the question "on stare decisis" because of "the seemingly clear applicability of [our] precedents." *See* majority opinion at 6-8. *But cf. id.* at 8 ("we have dealt with [the issue] only peripherally," it is "one we have never squarely addressed"). And see *Parker v. Lewis, supra*, p. 8. In truth, we have never focused on the no-interest rule in this context before, because the government did not rely on or even refer to the rule in prior cases. We have indeed spoken with approval not of interest, but of adjustment for delay in receipt of payment, as I observed at the outset when I said this panel initially faced the task of reconciling "two not fully consistent lines of decision." *Supra* p. 1. I now state why I believe the court's August 24, 1984, decision in *Murray v. Weinberger* renders it unnecessary to do more in this case than remand with directions to follow the instructions supplied in *Murray*.

II. Delay in Payment Instructions in *Murray v. Weinberger*

In *Copeland*, *Holly*, and a few cases thereafter, this court indicated that a delay factor adjustment

---

Federal Tort Claims Act], in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment . . . ." 28 U.S.C. § 2674 (1982). While the Federal Tort Claims Act refers to state law to supply rules of decision, *see id.* § 1346(b) (law of place where act or omission occurred), it appears that Congress wished to make it unmistakably clear that the traditional federal sovereign immunity rule, not state law, governs pre-judgment interest.

to the lodestar may be appropriate, even in litigation involving federal government defendants. The court stated in *Copeland*:

> The delay in receipt of payment for services rendered is an additional factor that may be incorporated into a contingency adjustment. The hourly rates used in the "lodestar" represent the prevailing rate for clients who typically pay their bills promptly. Court-awarded fees normally are received long after the legal services are rendered. That delay can present cash-flow problems for the attorneys. In any event, payment today for services rendered long in the past deprives the eventual recipient of the value of the use of the money in the meantime, which use, particularly in an inflationary era, is valuable. A percentage adjustment to reflect the delay in receipt of payment therefore may be appropriate.

641 F.2d at 893; *see also id.* at 906 n.61.[10] Along similar lines, the court in *Holly*, after rejecting an interest award, said: "We suggest . . . that the pos-

---

[10] The *Copeland* court noted that a delay factor adjustment may be unwarranted when the hourly rate used in the lodestar "is based on *present* hourly rates," as distinguished from "the lesser rates applicable to the time period in which the services were rendered." *Copeland*, 641 F.2d at 893 n.23 (emphasis in original); *see* National Ass'n of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1329 (D.C. Cir. 1982); *cf.* Environmental Defense Fund v. EPA, 672 F.2d 42, 60 (D.C. Cir. 1982) (limiting lodestar adjustment coupling "public benefit" and "delay in receipt of [Toxic Substances Control Act attorneys' fees]" in part because lodestar was calculated on the basis of current hourly rates). *Murray* developed *Copeland*'s exposition of this point.

sibility of a substantial delay in the payment of a fee is a factor which counsel may wish to bring to the court's attention when submitting his application for compensation." 639 F.2d at 798. Quoting the *Copeland* language set out above, the *Murray* panel instructed the district court that delay could be taken into account in either of two ways. *Murray*, slip op. at 16-19. Significantly, neither way involved the interest calculation eschewed in *Holly* but approved by my colleagues in this case.

I reiterate here *Murray*'s two instructions, starting with the one the Murray panel labeled "[f]irst." The court in *Murray* explained that if the expected wait for payment "is reflected in the lodestar figure itself, an additional enhancement for delay would not be appropriate":

> First, the court should determine whether the hourly rates incorporated into the lodestar . . . contain [delay] increments . . . . The basic hourly rate used in the lodestar figure [in *Murray*] was the rate prevailing in Title VII litigation, where lengthy delays often attend the payment of attorney's fees. . . . According to the fee applicants' affidavits . . ., the attorneys' hourly rates for billing concurrently . . . were substantially lower than the rates they charged pursuant to awards for attorney's fees under fee-shifting statutes, where lengthy delays are typically expected. . . . Thus the lodestar figures may already include adjustments for delay in payment.

Murray, slip op. at 17-18 (footnote omitted).

Only when the basic hourly rate incorporated into the lodestar did not "include[] a component for the delay which would have been expected in the payment of fees," *id.* at 17, does *Murray* authorize a further inquiry. With an eye on the "pressing need for simple rules in attorney's fee cases," *id.* at 18, the *Murray* court countenanced use of "current market rates instead of historic rates" in calculating lodestars, *id.*, if that would produce a reasonable fee "without generating a windfall for the plaintiff's attorneys." *Id.* at 19. There the matter would end under *Murray v. Weinberger*, for "where the hourly rate used in computing the lodestar is based on present hourly rates a delay factor has implicitly been recognized and no [further] adjustment for delay should be allowed." *Id.* (quoting *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d at 1329).

III. Application of *Murray* to the Present Case

In calculating the fee for Shaw's attorney Shalon Ralph, the district court, for the most part, followed the formula this court specified in *Copeland*. The district court first computed a lodestar of time and rate. It found that ninety-nine hours of Ralph's effort could be attributed to issues on which Shaw succeeded. *See Hensley v. Eckerhart*, 103 S.Ct. 1933, 1940-41 (1983) (where plaintiff achieves only partial success, fee awarded must exclude compensation for services rendered in connection with any unsuccessful claim). It then determined that an $85 hourly rate was appropriate for an attorney of Ralph's experience working on problems of employment discrimination in 1978 and 1979.[11] The district court

[11] It is significant that the court determined $85 per hour would have been an appropriate rate in 1978 and 1979 when the work was performed, rather than in late 1981 when the fee was awarded. *See supra* note 10.

did not consider, however, as *Murray* now requires, whether the $85 rate prevailed for clients who paid their bills promptly or whether it "included a component for the delay which would have been expected in the payment of fees" in cases of this genre. *Murray*, slip op. at 17; *see id.* at 7 n.21, 18 n.46 (lodestar rates of $80 to $95 per hour for 1978 to 1981 may have included a delay element where attorney billed plaintiff $50 per hour at time services were rendered); *cf.* majority opinion note 28.

Next, the district court determined that the lodestar should be reduced by 20% because the court judged the representation only 80% efficient. Correctly anticipating in this regard guidance our court just supplied in *Murray*, the district court declined to make any upward adjustment for the risk Ralph assumed by taking on a case in which part of the fee was contingent on victory.[12] *See Murray*, slip op. at 12-16 (upward adjustment for risk of losing on merits is unwarranted to the extent that lodestar itself comprehended allowance for contingent nature of fee payment; or fee arrangement with client substantially reduced attorney's risk of nonpayment; or risk of not prevailing was unexceptional).

Finally, the court increased the award to account for the three-year delay between the time Ralph should have been paid and the time he might finally expect payment. The court stated first that the case should have ended in 1978, upon or shortly after execution of the administrative settlement, not in late 1981, after a court proceeding that attentive counsel on both sides might have avoided. Next, the

[12] A retainer assured Ralph $30 per hour "win, lose, or draw." Shaw v. Library of Congress, No. 79-0325, slip op. 9 (D.D.C. Nov. 4, 1981).

court reasoned that if Ralph had been compensated in 1978 he could have invested the money at an average yield of at least 10%. Therefore, the court announced, its judgment would reflect an upward adjustment of 30% for delay.[13] That adjustment was an impermissible award of interest. I would instruct the district court, as *Murray* does, that, *if* it finds the basic hourly rate did not include a delay component, it may consider whether the use of current market rates might produce a reasonable fee.

Augmenting the inquiries *Murray* prescribed, and limiting the prospect *Murray*'s plan held for a uniform, manageable approach in the district court, the majority's opinion seemingly allows anything at all reasonable to go in the name of interest. No particu-

[13] The court declared that the 20% reduction of the lodestar to reflect deficiencies in the quality of representation and the 30% increase for delay yielded a net adjustment upward of 10%. A 20% adjustment down followed by a 30% adjustment up, however, yields a net upward change of only 4% (0.8 x 1.3 = 1.04). The district court might have more closely approached, although not reached, a net upward adjustment of 10% had it contemplated *compound* interest at 10% per annum (*e.g.*, annual compounding at 10% against a base of 0.8 would equal 1.0648). My point, misperceived in the majority opinion's note 22, is a small one, and surely does not involve any attribution to the district court of a design to "penalize [] counsel." I do not suggest that legal doctrine forbids an additive method of computing percentage change or mandates compound interest when additive computation is not employed. I discern in the district court's additive approach to percentage change—an approach wholly unexplained in the district court's opinion—nothing at all complex or subtle. I detect only an unintended "mathematical mistake," an oversight no more remarkable than the $20 multiplication error the majority discovered in the district court's very same calculation.

lar computation is instructed. Each judge has "broad latitude" to choose from a range of rates, concepts, and approaches, running from the simple to the compound, so long as the court's sizable discretion is not "abused." *See* Majority opinion note 22. *Murray*'s effort to accommodate, not overturn, decisional lines, to promote "[e]ase of administration," and, most of all, to "simplify the task of the district court," *Murray*, slip op. at 18, has been undermined by today's decision.[14]

For the reasons stated, I would return this case to the district court with a direction to follow to the letter the delay in payment analysis and instructions set out in *Murray v. Weinberger*.

---

[14] In preferring the complex to the simple in styling a solution to a case so modestly presented by the parties, and in precipitating an apparent circuit split, *see* Arvin v. United States, *supra* p. 8, the court has once again shown that ours is "a profession that prides itself on not throwing chaos lightly to the winds." Traynor, *Comment on Courts and Lawmaking*, in LEGAL INSTITUTIONS TODAY AND TOMORROW 48, 56 (M. Paulsen ed. 1959).

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0325

TOMMY SHAW, PLAINTIFF

v.

LIBRARY OF CONGRESS, ET AL., DEFENDANTS

[Filed Nov. 4, 1981]

MEMORANDUM

This matter is before the Court on the application of one of the prevailing plaintiff's attorneys, Shalon Ralph, Esq., for "a reasonable attorney's fee" pursuant to Title VII of the Civil Rights Act. 42 U.S.C. §§ 2000e-5(K) and 2000e-16(d). *See* Memorandum filed September 14, 1979.

A.

A summary account of the controversy is necessary to frame the issues. In October 1976, plaintiff, a GS-13 Personnel Psychologist at the Library of Congress, filed an informal complaint of discrimination based on race. He claimed, among other things, that the Library had not validated and corrected allegedly discriminatory job selection criteria. He filed two

other complaints, one in November 1976, and the other on January 18, 1977. In April 1977, Library officials began investigation of the complaint and rejected it on January 6, 1978. On January 7, 1978, plaintiff appealed and on January 16, 1978, engaged Mr. Ralph as his attorney. After briefly exploring the advisability of pursuing plaintiff's claim as a class action, Mr. Ralph elected to seek administrative relief. To this end he prepared and submitted extensive document requests on February 28, 1978 to Library officials, and engaged in conferences with them about his document request and his further request for an opportunity to interview witnesses. Library officials rebuffed these requests and scheduled the matter for administrative hearing on June 6, 1981, without apparently affording plaintiff any discovery. Mr. Ralph refused to attend a hearing under those circumstances, whereupon a Library official, in effect, dismissed plaintiff's administrative claim for failure to prosecute. Plaintiff, through his attorney, appealed to the Deputy Librarian who, on June 1, 1978, overruled the subordinate official's decision dismissing the claim. Beginning at about that time, Mr. Ralph and Library officials began negotiations which culminated on about August 16, 1978, in what should have been a final settlement of the dispute. That agreement, more fully described in this Court's Memorandum of September 14, 1979, contemplated, in plaintiff's view, that the Library would promote him to GS-14 and if the Comptroller General determined that the Library could do so legally, the Library would award plaintiff back pay as a GS-14 from January 18, 1977. In addition, the settlement agreement obligated the Library to take some remedial actions for the benefit of employees other than plaintiff, i.e., "to continue its

good faith effort to validate its employee selection procedures to the extent required by law as expeditiously as possible within its available resources and personnel, to involve plaintiff in this validation process, and to assign two professional staff members to assist him."

The settlement agreement did not, however, end Mr. Ralph's responsibility. A time-consuming dispute developed which he might reasonably have foreseen and avoided, but which he did not cause and about which he ultimately prevailed. Instead of asking the Comptroller General the general question of whether "the Library may grant . . . retroactive promotion and back pay under the facts of this case," (Memorandum of September 14, 1979, p. 2), the Library asked the Comptroller General narrower questions of whether the Back Pay Act, 5 U.S.C. § 5596 authorized such a payment. The Library failed to ask the Comptroller General whether Title VII authorized the retroactive payment. On November 2, 1978, the Comptroller General answered in the negative the narrower question asked about whether the Back Pay Act authorized a retroactive payment to plaintiff, but said he would express no opinion about whether Title VII authorized such a payment here. Thereafter in 1978, Mr. Ralph engaged in further exchange with Library officials and with representatives of the Comptroller General's office. By letter dated November 30, 1978, the Library advised plaintiff that Library regulation and the Comptroller General's ruling barred any retroactive pay for plaintiff. In a January 4, 1979 letter, the Library finally ended Mr. Ralph's administrative effort to establish plaintiff's right to back pay on the authority of Title VII. Mr. Ralph apparently recognized that litigating

to enforce the agreement was beyond his capacity, and the plaintiff was able to engage Hogan & Hartson.

With some assistance from Mr. Ralph on February 7, 1979, Hogan and Hartson filed a complaint, in effect, to require the Library to honor the agreement, as plaintiff and Mr. Ralph understood it. On September 14, 1979, this Court granted a motion for summary judgment, filed and prosecuted by Hogan and Hartson, vindicating plaintiff's claim for back pay. The order granting that motion provided for the award of "reasonable attorney's fees and other litigation costs reasonably incurred pursuant to 42 U.S.C. § 2000e-5(k), the precise amount of such fees and costs to be determined after further proceedings and a decision by our Court of Appeals *en banc* in *Copeland v. Marshall.*"

Thereafter, on May 11, 1981, Mr. Ralph filed the motion now before the Court for an award of attorney's fees in the amount of $8,818.75 and costs in the amount of $47.50. He supported his motion by a memorandum of points and authorities, his resumé, a chronological log accounting in some detail for the expenditure of 103.75 hours of attorney time between January 16, 1978, when plaintiff retained him and May 7, 1981, when he filed the motion at issue here.[1] Mr. Ralph also filed as exhibits to his motion his February 28, 1978 administrative discovery request and his December 18, 1978 letter to the Library urging retroactive back pay for plaintiff because of (or despite) the Comptroller General's ruling.

On June 11, 1981, defendant filed a Memorandum in Opposition (Opp.) to plaintiff's motion supported

[1] Some time was charged to preparing the fee motion.

by a brief affidavit of its general counsel. The memorandum suggested that Mr. Ralph spent substantial time exploring a class action suit, aborted the idea, and then entered into the August 30 agreement. *See* Opp. at pg. 2, lines 2-6. The general counsel's affidavit generally corroborated Mr. Ralph's account of the time spent in communication with affiant, but stated the opinion that:

> "Mr. Ralph's time at these conferences leading to the settlement agreement of August 16, 1978 . . . was not productively spent. His arguments and proposals on behalf of his client generally retrod old ground and offered no positive resolutions. Rather, it was the Library through Mr. Robert Hutchinson's and my efforts, that developed the approaches that lead to eventual settlement."

Defendant also filed some documents evidencing the rates charged by a number of local lawyers handling matters similar to this one.

On June 23, 1981, Mr. Ralph responded to defendant's Opposition and on September 11, 1981, at the Court's request, he submitted a supplemental affidavit about the time he spent exploring the aborted class action idea.

B.

Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980) contemplates that the Court first establish a lodestar of time and rate, and adjust from that to account for such things as the quality of counsel's service and any special risks such as contingency of counsel's access to compensation and the cost of delay in payment. Some consideration of benefit to a larger group or to the public interest, transcending plain-

tiff's narrower personal gain or relief, is in order under *Copeland*. However, as defendant emphasized:

> "[N]o compensation should be paid for time spent litigating claims upon which the party seeking the fee did not ultimately prevail."

Copeland v. Marshall, 641 F.2d at 892.

A. *The Lodestar*

1. *Hours*

From the presentation of the facts and the *Copeland* principles governing decision, it is apparent that it is not necessary to tarry long on either the accuracy of Mr. Ralph's claim that he spent 103.75 hours or that his client prevailed. Defendant "does not doubt that the gross or raw number of hours that [Mr. Ralph] spent on this litigation involved approximately that number of hours." Opp. at p. 4. Indeed, it appears that he has not included some of the time he has consumed in an effort to overcome defendant's opposition to his fee application.

2. *Hours Attributable to Issues on Which Plaintiff Prevailed*

Nor is there any question about which party prevailed and who achieved it. Plaintiff got nowhere until he retained Mr. Ralph. While he was representing plaintiff, the case received the attention of the Library's General Counsel and its Director of Personnel, who fashioned an agreement after plaintiff's attorney pressed them. The resulting agreement gave plaintiff a promotion and what proved to be a legal right to retroactive back pay. The improvement of validation procedures undertaken by the Library in

the settlement agreement with plaintiff purportedly benefited other employees.

It is to Mr. Ralph's credit that he recognized his limitations and handed over responsibility for enforcement of the agreement to strong, experienced litigating counsel. It takes one degree of skill and stamina to precipitate and negotiate a dispute settlement with the government and another to force the government to turn square corners in the execution of such an agreement.[2] Plaintiff not only prevailed in the ensuing litigation, but Mr. Ralph's records indicate that he spent a minimal fourteen hours informing Hogan and Hartson of his own experience with the case, assisting with discovery responses, and acting as interface between plaintiff and trial counsel. In any event, Mr. Ralph is entitled to compensation for work on the administrative phase because plaintiff prevailed there and for assisting Hogan and Hartson who also prevailed. Additional legal service, for which plaintiff was not compensated, was required to construe and enforce the agreement arrived at in the administrative phase.

Defendant puts great emphasis on counsel's consideration of a class action. Concerned that this consideration might have consumed an unreasonable amount of time, the Court required Mr. Ralph to supplement his time records with an affidavit which he filed September 11, 1981. Together, they establish, without contradiction by defendant, that plaintiff spent a total of 4.75 hours "researching and investi-

---

[2] "It is very well to say that those who deal with the Government should turn square corners. But there is no reason why the square corners should constitute a one-way street." Federal Crop Ins. Corp. v. Merrill, 332 U.S. 380, 387-88 (1947) (Jackson, J., dissenting).

gating the . . . matter of a class action" and, he added with commendable candor: "I concluded that a class action was not advisable, and therefore devoted no further time to it." Although plaintiff did not pursue a class action, his investigation may not have been entirely fruitless because the ultimate agreement made provision for validation for other employees which might have been a by-product of plaintiff's attorney's consideration of a class action. Nonetheless, the Court concludes that consideration of the class action possibilities was pursuit of an issue on which plaintiff did not prevail. Accordingly, the Court finds that 4.75 hours should be subtracted from the hours element of the lodestar reducing them from 103.75 to 99.

3. *Hourly Rate*

Mr. Ralph seeks compensation at the rate of $85 per hour. His engagement with plaintiff was "partially contingent." Plaintiff previously paid him $30 per hour for his time, regardless of the result. Response to Defendant's Opposition, p. 4 (Response). Mr. Ralph represents that this rate was lower than "that which would be reasonable if counsel had no expectation of receiving a higher hourly rate upon settlement or judgment." Memorandum of Points and Authorities in Support of Plaintiff's Motion for Attorney's Fees (Plaintiff's Memorandum, p. 5.) He indicates, however, that he has no customary fee which would be germane to a determination of a reasonable rate. He points instead to fee awards by other judges which range from $65 to $125 per hour for cases of this nature. He points specifically to a $75 per hour fee awarded by Judge Richey for work performed in 1977 and an $85 per hour award by

him for work performed in 1978. Counsel argues that if these rates were appropriate for Title VII representation in those years, inflation considerations justify his rate of $85 per hour for work in 1978

With respect to an hourly rate, defendant emphasizes that in the absence of any other evidence of a rate, the $30 per hour minimum agreed upon is an important factor to be considered. In addition, defendant points to the $75 per hour ceiling established by the Equal Access to Justice Act which became effective in 1981 reflecting a considered opinion by Congress of a reasonable fee. Defendant also cites the fee range of $45 to $60 per hour paid by the Department of Justice for representation by private counsel.[3]

Finally, defendant filed and thereby invited the Court's attention to rates stated by attorneys who have held themselves out in the 1979-1980 Lawyers Directory of the District of Columbia Bar as available to represent clients with employment discrimination claims. These quoted rates in the range of $50 to $80 per hour are subject frequently to adjustment to reflect the client's ability to pay, contingency and similar considerations.

In response, Mr. Ralph cites Judge Aubrey Robinson's recent award in a case outside the field of employment discrimination: $125 per hour for very experienced attorneys with more than 20-years experience, $65 to $110 per hour for experienced attorneys, and $65 per hour for inexperienced ones. *North Slope Borough v. Andrus*, 515 F.Supp. 961 (D.D.C. 1981). Response p. 5.

---

[3] Such Department of Justice engagements, of course, have a special prestige value to attorneys.

Mr. Ralph's resumé reflects that he is now 74-years old and graduated from the University of Pennsylvaia Law School in 1905 [*sic*]. His affidavit and resumé account for his career since he entered private practice in 1933, include a number of law-related assignments while in military service and eight years as an attorney with the Foreign Claims Settlement Commission. Since his retirement in 1974, he claims to have represented 15 clients who alleged employment discrimination. He was one of the original members of the Employment Discrimination Complaint Service of the District of Columbia Bar. On this record, the Court is persuaded that although he has long experience, it is not sufficiently focused to establish him as very experienced as that term was used by Judge Robinson, at least in civil rights matters.

Out of all this welter of information about rates, the Court concludes that counsel is entitled to a lodestar rate of $85 per hour. As a result, the Court calculates the lodestar fee to be 99 hours at $85 per hour or $8,435.

B. *Adjustment to Lodestar*

Copeland contemplates a number of possible adjustments to the lodestar calculation, e.g., quality of representation, contingency, and delay in payment. Other factors identified in *Copeland* have no apparent relevance here. The relevant considerations will be briefly discussed.

1. *Quality of Representation.* It is apparent from the entire record including, but not limited to, the observation of defendant's general counsel, that Mr. Ralph displayed no outstanding skill in the administrative phase or in effecting the settlement. For example, he asserts that defendant obstructed his effort to make discovery. But his letter of February 28, 1978 exposes the fact that his discovery request was much too broad, quite unfocused, and virtually impossible to honor. The request reflects an inadequate sense of relevance and was plainly a disservice to his client. On another level, it is no credit to the Library that they dealt in the way they did with its obligation under the settlement agreement to inquire of the Comptroller General. But more astute counsel would have detected and closed unequivocally the loophole which defendant claimed to find in the agreement, and would have participated earlier and more aggressively in the presentation of the problem to the Comptroller General. Had Mr. Ralph measured up fully to his responsibility, Hogan and Hartson, the Department of Justice, and this Court might have been spared the task of resolving in litigation the extra dispute which ensued. While the Court is not able to measure an appropriate adjustment in terms of hours or rates per hour, a percentage adjustment of the lodestar is plainly in order. The Court concludes that on a scale of 100, Mr. Ralph was not more than 80% as efficient and astute as a lawyer of his chronological experience could reasonably be expected to be. Accordingly, the Court will reduce the lodestar fee by 20% to reflect deficiencies in the quality of service.

2. *Contingency.* Mr. Ralph's $30 per hour retainer partially compensated him for the risk he undertook that plaintiff would not prevail. He was assured of a substantial fee, win, lose, or draw. He nevertheless requests an adjustment in an unspecified amount to account for the contingency. He was unable to quantify the adjustment which he sought

and supplied no precedent or other criteria to guide the Court. In the absence of such guidance, the Court is persuaded that the partial retainer obviates the justification for a contingency adjustment.

3. *Delay.* Adjustment for delay is another matter. This case should have ended in August 1978, or at the latest in November of that year. If Mr. Ralph had been compensated at about that time, he could have invested the money at an average yield of not less than 10% per year. It is the fault of neither plaintiff nor Mr. Ralph that payment was not made sooner.[4] It is reasonable to assume that if payment is made promptly, counsel will receive his reimbursement by December 1, 1981. Accordingly, the accompanying order reflects an upward adjustment of 30% for delay.

Thus, counsel is entitled to a lodestar fee of $8,435 plus a net adjustment upward of 10% or $9,278.50 plus $47.50 in costs.

* * * * *

There remains a question arising from the fact that although the Court has determined that Mr. Ralph is entitled to a fee of $9,278.50, his client has already paid him $30 per hour for his services or, presumably, a total of $3,100. It is plain from the statute that the defendant's obligation to pay a fee in circumstances like these is not reduced by the fact that plaintiff has previously paid one. But the defendant's obligation is to pay counsel a reasonable fee, not a second fee, or a windfall. Accordingly, the accompanying order will require that Mr. Ralph credit or reimburse plaintiffs for the fees previously

---

[4] Even though *Copeland* was unresolved at the time, defendant could have tendered partial payment sooner.

paid, and furnish the Clerk of the Court and the defendant with a certificate evidencing such credit or payment within 30 days after he receives payment.

/s/ Louis F. Oberdorfer
United States District Judge

November 4, 1981

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 79-0325

TOMMY SHAW, PLAINTIFF

v.

LIBRARY OF CONGRESS, ET AL., DEFENDANTS

[Filed Nov. 4, 1981]

ORDER AND JUDGMENT

For reasons more fully stated in the accompanying Memorandum, it is this 4th day of November, 1981 hereby

ORDERED: That JUDGMENT is entered for plaintiff, in the amount of Nine Thousand Three Hundred Twenty-Six Dollars ($9,326) plus costs; and it is further

Ordered: That Shalon Ralph, Esq. shall, within thirty (30) days after receipt of any payment from the proceeds of the judgment, serve on defendant and file with the Clerk of this Court a certificate that he has credited or reimbursed plaintiff for fees heretofore paid to him by plaintiff for services which are the subject of this judgment.

/s/ Louis F. Oberdorfer
United States District Judge

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

Civil Action 79-00325

No. 82-1019

TOMMY SHAW

v.

LIBRARY OF CONGRESS, ET AL., APPELLANTS

Appeal from the United States District Court
for the District of Columbia

Before: ROBINSON, Chief Judge; WALD and GINSBURG, Circuit Judges

---

[Filed Nov. 6, 1984]

JUDGMENT

THIS CAUSE came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

ON CONSIDERATION THEREOF It is ordered and adjudged by this Court that the order of the District Court appealed from in this cause is hereby affirmed, and this case is remanded to the District Court solely in order that the Court may confirm that Shaw's counsel is not being paid twice for the delay he experienced, all in accordance with the Opinion for the Court filed herein this date.

Per Curiam

FOR THE COURT:

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: November 6, 1984
Opinion for the Court filed by Chief Judge Robinson.
Dissenting Opinion filed by Circuit Judge Ginsburg.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 82-1019

TOMMY SHAW

v.

LIBRARY OF CONGRESS, ET AL., APPELLANTS

[Filed Feb. 20, 1985]

Before: ROBINSON, *Chief Judge*, WALD and GINSBURG, *Circuit Judges*

ORDER

Upon consideration of appellants' petition for rehearing, filed December 20, 1984, it is

ORDERED, by the Court, that the aforesaid petition is denied.

Per Curiam

For the Court
GEORGE A. FISHER

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1984

No. 82-1019

TOMMY SHAW

v.

LIBRARY OF CONGRESS, ET AL., APPELLANTS

Before: ROBINSON, Chief Judge, WRIGHT, TAMM, WALD, MIKVA, EDWARDS, GINSBURG, BORK, SCALIA and STARR, Circuit Judges

---

[Filed Feb. 20, 1985]

ORDER

Appellants' Suggestion for Rehearing *en banc*, filed December 20, 1984, has been circulated to the full court and the majority of the Judges in regular active service have not voted in favor thereof. On consideration of the foregoing, it is

---

* Judges Ginsburg, Bork, Scalia and Starr would grant the Suggestion for Rehearing *en banc*.

ORDERED, by the Court *en banc*, that the aforesaid Suggestion is denied.

Per Curiam

For the Court:

GEORGE A. FISHER
Clerk

By: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 461531 10249

OPPOSITION

BRIEF

(3)

No. 85-54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LIBRARY OF CONGRESS, *et al.*,

Petitioners,

v.

TOMMY SHAW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON
(Counsel of Record)
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

---

42 pp

QUESTION PRESENTED

Whether 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, which incorporates 42 U.S.C. § 2000e-5(k), constitutes a complete waiver of sovereign immunity so that the relief obtainable, including the amount of attorneys fees, against a federal agency in a Title VII action is the same as that obtainable against all other employers.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
STATUTE INVOLVED	1
STATEMENT	2
REASONS FOR DENYING THE WRIT	6
SUMMARY	6
DISCUSSION	8
1. Background	8
2. Section 717 is a Complete Waiver of Sovereign Immunity	10
3. The Decision Below Does Not Conflict With Prior Decisions of This Court	14
4. There is No Conflict Between the Circuits	24
CONCLUSION	25

TABLE OF AUTHORITIES

Case	Page
Albrecht v. U.S. 329 U.S. 599 (1947)	16
Boston Sand Co. v. U.S., 278 U.S. 41 (1928)	20
Brown v. General Services Administration, 425 U.S. 820 (1976) 6,11,12	
Chandler v. Roudebush, 425 U.S. 860 (1976)	6,9,11
Commonwealth of Puerto Rico v. Heckler, 745 F.2d 709 (D.C. Cir. 1984)	3
Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980)	2,7
Eastland v. T.V.A., 553 F.2d 364 (5th Cir. 1977)	9
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)	12
Gautreaux v. Chicago Housing Authority, 690 F.2d 601 (7th Cir. 1982)	7
Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983)	7

Case	Page
Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969)	11
Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3rd Cir. 1985) ...	7
Johnson v. University College of the University of Alabama, 706 F.2d 1205 (11th Cir. 1983)	7
Jorstad v. IDS Realty Trust, 643 F.2d 1305 (8th Cir. 1981)	7
Kyles v. Secretary of Agriculture, 604 F. Supp. 426 (D.D.C. 1985)	4
National Ass'n of Concerned Vets v. Sec. of Defense, 675 F.2d 1319 (D.C. Cir. 1982)	3
Parker v. Lewis, 670 F.2d 249 (D.C. Cir. 1982)	3
Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983)	7
Shultz v. Palmer, No. 85-50	5
Standard Oil Co. v. United States, 267 U.S. 76 (1925)	22,23
Tillson v. United States, 100 U.S. 43 (1879)	19

Case	Page
United States v. Alcea Band of Tillamooks, 341 U.S. 48 (1951)	14,15
United States v. Goltra, 312 U.S. 203 (1941)	17,18
United States v. Louisiana, 446 U.S. 253 (1980)	16
United States v. New York Rayon Importing Co., 329 U.S. 654 (1947)	17,18
United States v. North America Trans. & Trading Co., 253 U.S. 330 (1920)	17,18
United States v. Sherman, 98 U.S. 565 (1879)	19
United States v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947)	17,18
United States v. Worley, 281 U.S. 339 (1930)	22,23
United States ex rel Angerica v. Bayard, 127 U.S. 251 (1888)	15
Williams v. T.V.A., 552 F.2d 691 (6th Cir. 1977)	9

Page

Statutes:

42 Stat. 1590, ch. 192 (5-15-22) 20

1,8
42 U.S.C. § 2000e-5(k) 10,18,24

42 U.S.C. § 2000e-16 1,12

Legal Fees Equity Act 5

Section 717 of the Equal Employment Opportunity Act of 1972 ..... passim

Section 177, Judicial Code 17

28 U.S.C. § 2516(a) 17

Other Authorities

"Counsel Fees in Public Interest Litigation," Report by the Committee on Legal Assistance, 39 The Record of the Association of the Bar of the City of New York 300 (1984) 7

Legislative History of the Equal Employment Opportunity Act of 1972, Committee Print, Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (1972) 13

Page

Ralston, The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws, 10 Ga. L. Rev. 717 (1976) 10

Schlei and Grossman, Employment Discrimination Law (2nd Ed. 1983) 11,24

S. Rep. 92-45 (92d Cong. 1st Sess.) 13

No. 85-54

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

LIBRARY OF CONGRESS, et al.,

Petitioners,

v.

TOMMY SHAW

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATUTE INVOLVED

In addition to 42 U.S.C. § 2000e-5(k), set out in the petition, this case involves Section 717 of the Equal Employment Opportunity Act of 1972, 42 U.S.C. § 2000e-16, which is set out in the appendix hereto.

STATEMENT

In general, respondent adopts the statement of the case of the petitioners, but would like to emphasize two points. First, a significant part of the delay between settlement of the merits and disposition of the attorneys' fee issue was occasioned by the district court's waiting for the disposition of the appeal in Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980), that was taken by the government.

Second, the issues raised by this case should not be viewed in isolation from the government's persistent attempts to have fees assessed against it in employment discrimination cases on a different basis than that which applies to all other employers. Following the rejection of arguments in Copeland that fees against the government should be

based on a "cost-plus" analysis, and therefore should be lower, the government, first in cases in the District of Columbia and later elsewhere, has adamantly argued that fees to a prevailing party should not be awarded at rates higher than, first, $60 per hour, and later $75 per hour. This, and other practices that have led to the prolongation of attorneys' fees litigation, have been severely criticized by the court of appeals[1] and the district

---

[1] Thus, in Parker v. Lewis, 670 F.2d 249, 250 n.2 (D.C. Cir. 1982), the court found it "difficult to accept the bona fides of a contention that a $60 per hour fee is the appropriate maximum for an experienced attorney in the District of Columbia."

In National Ass'n of Concerned Vets. v. Sec. of Defense, 675 F.2d 1319, 1337-38 (D.C. Cir. 1982), Judge Tamm, concurring, was sharply critical of the government's tactics in opposing attorneys' fees. He noted repeated requests for extensions of time, the failure to conduct any discovery, and the making of "broadly based, ill-aimed attacks" and "nit-picking claims." See also 675 F.2d at 1329-30.

In Commonwealth of Puerto Rico v. Heckler, 745 F.2d 709, 714 (D.C. Cir. 1984), the circuit court noted this

court in the District of Columbia,[2] but

Court's admonitions that attorneys' fees requests should not result in "a second major litigation." It warned against "obdurate and intransigent" "non-negotiable postures on fee awards" that "will not be 'worthy of our great government.'"

2 In Kyles v. Secretary of Agriculture, 604 F. Supp. 426 (D.D.C. 1985), Judge Oberdorfer, the district judge in the present case, recited a long history of delaying tactics and unreasonable positions taken by the government. One result of this history was that the plaintiff, although she had already prevailed on the merits, had to borrow money to pay her lawyer. The judge concluded:

> It is a fact of life that in most employment discrimination cases the client or the lawyer does not have the resources to hold out for as long as the government can protract a fee dispute. There are strong indications that, knowing this, some civil officers of the Executive Branch have drawn a line in the dust: any party or lawyer who claims more than $75 per hour will have to fight for it -- through formal discovery and dilatory motions for extensions of time and for reconsideration, capped by automatic appeals, many of them abandoned when briefing time approaches. By this form of "jawboning," these officers may well be attempting to enact a de facto ceiling of $75, contrary to the statutes enacted by Congress and authoritatively interpreted by the courts.

persist even in the face of Congress' refusal to amend the attorneys' fees statutes to enact such limits.[3] Thus, the arguments advanced in this case and Shultz v. Palmer, No. 85-50, are part of an overall effort to evade the clear intent of Congress that the United States be liable for fees "the same as a private person."

---

604 F. Supp. at 436.

See also the district court's opinion in Palmer v. Shultz, reprinted in the petition for writ of certiorari in No. 85-50 at pp. 42a-43a.

3 The "Legal Fees Equity Act," drafted by the Department of Justice, was introduced in the 98th Cong., 2d Sess., as H.R. 5757 and S. 2802. The Act would have placed an absolute cap of $75 on fee awards against the government and would have prohibited all multipliers or upward adjustments. The bill failed to be reported out of committee in either house.

REASONS FOR DENYING THE WRIT

SUMMARY

Respondent urges that the Petition should be denied for a number of reasons:

First, the decision below is fully consistent with holdings of this court that Section 717 of the Equal Employment Opportunity Act of 1972 was intended to and did give federal employees the same rights in actions brought under Title VII of the Civil Rights Act of 1964 as were enjoyed by all other employees. Chandler v. Roudebush, 425 U.S. 860 (1976); Brown v. General Services Administration, 425 U.S. 820 (1976).

Second, the clear intent of Congress was to enact a complete waiver of the sovereign immunity of federal agencies in cases brought under Title VII to remedy discrimination in employment. Therefore,

any holding to the contrary would be completely at odds with the purposes of Section 717.

Third, it is clear, and the government does not dispute the point, that adjustments to attorneys' fee awards to compensate for delay in payment are a necessary part of calculating a reasonable fee in civil rights cases. Indeed, the courts of appeals have been, to date, unanimous in so holding,[4] and such a

---

[4] See, e.g., Copeland v. Marshall, 641 F.2d at 892-93; Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3rd Cir. 1985); Graves v. Barnes, 700 F.2d 220, 224 (5th Cir. 1983); Gautreaux v. Chicago Housing Authority, 690 F.2d 601, 612 (7th Cir. 1982); Jorstad v. IDS Realty Trust, 643 F.2d 1305, 1313 (8th Cir. 1981); Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983); Johnson v. University College of the University of Alabama, 706 F.2d 1205, 1210-11 (11th Cir. 1983). See also "Counsel Fees in Public Interest Litigation," Report By the Committee on Legal Assistance, 39 The Record of the Association of the Bar of the City of New York 300, 318 (1984).

conclusion is consistent with the decisions of this court with regard to attorneys' fees.

Finally, the decision of the court below, stating that the language of 42 U.S.C. § 2000e-5(k) that the United States is to be held liable for costs and attorneys' fees "the same as a private person" requires that fees against the federal government be calculated in the same way as they are against any other party, is clearly correct. The government's reliance on cases involving the assessment of interest on ordinary damage awards against the government is simply misplaced.

DISCUSSION

1. Background

This case must be placed in the context of the long, and somewhat dis-

tressing, history of the government's attempts to argue that despite the clearly expressed intent of Congress, it is to be treated differently than other employers in Title VII cases. That history, which need not be detailed here at length,[5] began with arguments that trials of employment claims against the government should not be de novo proceedings,[6] continued with arguments that the government could not be subjected to class actions,[7] and persists with the government's efforts to argue that the relief that may be awarded against it is less than the relief that is commonplace when an employer that is not a federal agency

---

5 See, Brief for Respondent in United States Postal Service Bd. of Governors v. Aikens, No. 81-1044, pp. 42-48, for a recounting of this history.

6 Chandler v. Roudebush, supra.

7 See, Eastland v. TVA, 553 F.2d 364 (5th Cir. 1977) and Williams v. T.V.A., 552 F.2d 691 (6th Cir. 1977).

is involved. Indeed, early on the government went so far as to argue, in the face of the clear language of § 2000e-5(k), that sovereign immunity barred any award of attorneys' fees.[8]

2. Section 717 is a Complete Waiver of Sovereign Immunity

Thus, this case in fact raises a broader question than that presented by the government; if certiorari is granted, respondent will argue that in all respects, whether it be with regard to attorneys' fees or backpay on behalf of a plaintiff, precisely the same relief can be obtained against federal agencies as can be obtained against any other employer. We contend that this was the clearly expressed intent of Congress when

---

8 See Ralston, The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws, 10 Ga. L. Rev. 717, 719 n.13 (1976).

it enacted Section 717 and, indeed, this Court has so held in cases interpreting both the language and the intent of Section 717. Chandler v. Roudebush, supra; Brown v. GSA, supra.

As this Court noted in Brown v. GSA, 425 U.S. at 826-827, one of the main concerns of Congress when it enacted the Equal Employment Opportunity Act in 1972 was to eliminate any question that sovereign immunity barred or limited the relief that may be obtained by federal employees upon proof of a violation of their right to be free of discrimination in employment. A leading decision had held, for example, that sovereign immunity was a bar to an action challenging a denial of a promotion on the ground of a violation of the Executive orders prohibiting discrimination.[9]

---

9 Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969). See Schlei and Grossman, Employment Discrimination Law, 1187-89 (2d

In 1972, of course, another concern of Congress was to broaden the relief provisions of Title VII generally so as to ensure that employees who had suffered discrimination could be made whole in every respect. See, Franks v. Bowman Transportation Co., 424 U.S. 747, 763-64 (1976). With regard to the federal government, Congress did not to attempt to enumerate all the possible types of relief that federal employees might obtain. Instead, Congress simply incorporated the relief provisions that applied to private and state and local government employees into Section 717's provision regarding actions brought by federal employees.[10]

---

ed. 1983), for a discussion of the history of § 717.

10 42 U.S.C. § 2000e-16(d) states that, "The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder." Thus, the provisions governing actions against private and state and local government employers "govern such issues as . . . attorneys' fees and the scope of relief." Brown v. GSA, 425 U.S. at 832.

In committee reports Congress reiterated that its specific purpose was to ensure that federal employees obtain precisely the same type and scope of relief that was available to all other employees.[11] Thus, Congress' failure to specify that adjustments in attorneys' fees and backpay awards to compensate for delays in payment can be made, cannot be read as an intent to bar such relief. To the contrary, the clear intent was to effect a complete, total, and absolute waiver of sovereign immunity with regard to the remedies obtainable under Title VII.

---

11 See, S. Rep. 92-45 (92d Cong. 1st Sess), p. 16, reprinted in Legislative History of the Equal Employment Opportunity Act of 1972, a Committee Print of the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare (Nov. 1972), p. 425 (hereinafter "Legis. Hist."). See also Legis. Hist. 1851 (Conference Committee Report); Legis. Hist. 85 (House Report).

3. The Decision Below Does Not Conflict With Prior Decisions of This Court

The various cases cited by the government in its petition for writ of certiorari are simply inapposite. Neither the language of the statutes involved nor anything in their legislative history indicates an intent to abrogate sovereign immunity in its entirety. Rather, the intent was to provide limited remedies, depending upon the nature of the claim and the role of the government in the circumstances involved.

For example, petitioners contend, petition at 8, that United States v. Alcea Band of Tillamooks, 341 U.S. 48, 49 (1951) can be read for the proposition that interest cannot be recovered "unless the awarding of interest was affirmatively and separately contemplated by Congress." Yet Alcea makes no mention of Congressional

"contemplation," nor any suggestion that interest must be "affirmatively" or "separately" contemplated or even provided for in the statute. "Express" statutory provision is all that Alcea requires. Id. at 49. The Act in question in Alcea, 49 Stat. 801, ch. 686 (8-25-35), was strictly jurisdictional in nature, and was silent on the matter of specific relief, let alone interest. There was not, needless to say, any analogy to private defendants.

Indeed, in all save one of the cases cited there is no analogy, as in the Title VII context, to any previous statutory scheme which awarded interest against private defendants. These cases dealt solely with statutes that were uniquely applicable to actions against the federal government. U.S. ex. rel. Angerica v. Bayard, 127 U.S. 251 (1888),[12] for example,

---

[12] Cited at petition, p. 9.

concerned a contractual agreement between the State Department and Spain; there was no statute or Congressional action whatsoever. In U.S. v. Louisiana, 446 U.S. 253 (1980),[13] the disputed provision concerned a specific agreement between the federal government and a state regarding receipts from minerals which had been removed and held by the federal government until a jurisdictional controversy could be resolved. Id. at 256. There could be no analogous statutory scheme regarding private parties. Similarly, Albrecht v. U.S., 329 U.S. 599 (1947),[14] concerned one-time, individual land-purchase agreements entered into by the United States. Those contracts did not provide for interest.

---

[13] Cited at p. 9.

[14] Cited at p. 9.

Petitioners cite, at pp. 9-10, a series of cases, U.S. v. New York Rayon Importing Co., 329 U.S. 654 (1947), U.S. v. Thayer-West Point Hotel Co., 329 U.S. 585 (1947), U.S. v. Goltra, 312 U.S. 203 (1941), and U.S. v. North American Trans. & Trading Co., 253 U.S. 330 (1920), which denied interest under § 177 of the Judicial Code (predecessor of 28 U.S.C. § 2516(a)), which permitted awards of interest against the United States in the Claims Court "only under a contract or Act of Congress expressly providing for payment thereof."

Petitioners are correct that § 177 merely "codified the traditional rule," see, e.g., New York Rayon, 329 U.S. at 658, but reliance on these cases is faulty for at least two reasons. First, there is no basis for concluding that the requirement of expressness is lacking in the instant case. The court below in fact

held that the waiver in 42 U.S.C. § 2000e-5(k) is express. App. to petition (P.A.), pp. 17a and 18a. Second, the cited cases all deal with narrow and specific Acts, leases, and contracts, in regard to which only the United States can be a defendant party. None reflect a complex statutory sheme, such as that found in Title VII, § 717, in which Congress has elected to establish a comprehensive parallel between civil actions running against both private parties and the federal government.[15]

[15] New York Rayon concerns the Act of May 14, 1937, 50 Stat. 137, 142, ch. 180, and the Act of June 25, 1938, 52 Stat. 1114, 1149, ch. 681, appropriation statutes regarding refunds on customs duties. 329 U.S. at 659. Thayer-West Point discusses the Act of March 30, 1920, providing for "just compensation" for construction of a hotel on U.S. Army property, and a private lease between the Secretary of War and the plaintiff under the provisions of that Act. 329 U.S. at 586. Goltra concerns a private contract between the plaintiffs and the federal government, providing simply for "just compensation" in regard to a lease of boats. 312 U.S. at 205-06. North American Trans. & Trading involved an implied contract concerning the taking of private land. 253 U.S. at 335.

U.S. v. Sherman, 98 U.S. 565 (1879), also cited by petitioner at p. 10, concerns the Acts of March 3, 1863 and July 28, 1866, which merely confer jurisdiction for suits against revenue officers for which the Treasury is liable. Id. at 565, 567. Tillson v. U.S., 100 U.S. 43 (1879), cited at p. 11, dealt with a "special" Act between plaintiff and the United States, providing for relief "equitably due." Id. at 46. There, the Supreme Court explicitly noted that "[t]he special statute does not even provide that the adjustment shall be made upon principles applicable to suits between citizens." Id.

In Title VII, on the other hand, Congress clearly meant to have § 717 provide plaintiffs with a full scope of remedies against the federal government, equivalent to those available against

private parties. The context as well as the language of the statute makes such a conclusion more than "express."

The structure of § 717 and Title VII is simply unlike any in the cases cited by petitioners. In the cited cases, there was not a clear intention of Congress to construct a parallel scheme of remedies between private defendants and the federal government. The one apparent exception is Boston Sand Co. v. U.S., 278 U.S. 41 (1928), cited at p. 10. Boston Sand concerned yet another "special" private Act,[16] yet this one awarded damages against the United States "upon the same principle and measure of liability with costs as in like cases ... between private parties...." 287 U.S. at 46.

---

16 42 Stat. 1590, ch. 192 (5-15-22).

In denying an award of interest against the United States, however, Justice Holmes found that close scrutiny of the context of the statute indicated that Congress did not mean to "put the United States on the footing of a private person in all respects." Id. at 47. Holmes was satisfied that a subsequent statute denying interest expressed a policy which had been assumed for many years previously. Congress was accustomed to using "a certain phrase with a more limited meaning than might be attributed to it by common practices," id. at 48; that interest was excluded in many similar private acts was "generally ... understood." Id. at 47. An examination of Congressional intent in the present case, in contrast, yields precisely the opposite result, namely, that Congress meant to put the federal government on identical footing with all other defendants.

As the court below noted, P.A. at 33a-34a, this case is squarely governed by Standard Oil Co. v. U.S., 267 U.S. 76 (1925), where the federal government was held liable for interest despite the absence of an express waiver. In that case, the Court ruled that where the United States acts as a private insurer, "it had without more consented to be treated as a private insurer." P.A. at 34a. See 267 U.S. at 79.

Petitioners' attempt to limit Standard Oil by reliance on U.S. v. Worley, 281 U.S. 339 (1930), is unfounded. Petitioners note that in Worley the Court declined to apply Standard Oil "outside of its specific commercial and contractual context." Petition at p. 11, n.9, citing Worley, 281 U.S. at 343-44. But such logic begs the question, for, as the court below noted, it is precisely in their "specific commercial and contractual

contexts" that Standard Oil and Worley diverge fundamentally, in that the U.S. was serving as a private insurer only in the former. P.A. at 34a, n.116. In Worley, the government was merely disbursing disability benefits to servicemen, a function without a parallel in the private world. 281 U.S. at 342-43. The United States was not acting, as in Standard Oil, in the same role as that of private insurers. Thus, the difference in the essential context of the government's position in the two cases directly parallels the distinctions between the litany of cases with which petitioners buttress their claim, and the actual role of the United States in the specific scheme of Title VII as amended.

4. There Is No Conflict of Circuits

Finally, no other circuit, to respondent's knowledge, has held that attorneys' fees awards against the federal government in Title VII cases are not to be calculated on precisely the same basis as are awards against all other employees. The Title VII decisions cited by the government at p. 15 of the petition involve back pay awards. Therefore, they do not involve the specific language of § 2000e-5(k).[17] The decisions interpreting the Equal Access to Justice Act cited at p. 16 are similarly inapposite.

[17] Moreover, as indicated above, if certiorari is granted respondent will argue that those cases were wrongly decided for the reasons outlined here at pp. 10-13. See also, Schlei and Grossman, Employment Discrimination Law 1214 n.175 (2d ed. 1983).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON
(Counsel of Record)
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

STATUTORY APPENDIX

42 U.S.C. § 2000e-16

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination

based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall --

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of

this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules,

regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to --

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency or unit responsible for carrying out the equal

employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding

Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) The provisions of section 706(f) through (k), as applicable, shall govern civil actions brought hereunder.

(e) Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibilities under Executive Order 11478

relating to equal employment opportunity in the Federal Government. (July 2, 1964, P.L. 88-352, title VII, § 717, as added Mar. 24, 1972, P.L. 92-261, § 11, 86 Stat. 111, as amended, Feb. 15, 1980, P.L. 96-191, § 8(g), 94 Stat. 34.)

REPLY

BRIEF

No. 85-54 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

LIBRARY OF CONGRESS, ET AL., PETITIONERS

v.

TOMMY SHAW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

CHARLES FRIED
Acting Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

8 pp

TABLE OF AUTHORITIES

Page

Cases:

Albrecht v. *United States*, 329 U.S. 599 2

Arvin v. *United States*, 742 U.S. 1301 ..... 3, 4, 5

Brown v. *GSA*, 425 U.S. 820 3

International Woodworkers of America, AFL-CIO, Local 3-98 v. *Donovan*, No. 84-1887 (9th Cir. Aug. 28, 1985) 4

Knights of the Ku Klux Klan v. *East Baton Rouge Parish School Board*, 735 F.2d 895 ..... 4, 5

Lehman v. *Nakshian*, 453 U.S. 156 3

Saunders v. *Claytor*, 629 F.2d 596, cert. denied, 450 U.S. 980 2

Standard Oil Co. v. *United States*, 267 U.S. 76 4

United States v. *Alcea Band of Tillamooks*, 341 U.S. 48 2

United States v. *Goltra*, 312 U.S. 203 2

United States v. *North American Trans. & Trading Co.*, 253 U.S. 330 4

United States v. *Sherman*, 98 U.S. 565 2

United States v. *Verdier*, 164 U.S. 213 4

United States v. *Worley*, 281 U.S. 339 5

Page

Statutes:

Age Discrimination in Employment Act, 29 U.S.C. 633a 3

Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.* 2

42 U.S.C. 2000e-5(k) 1, 3, 4

Equal Access to Justice Act:

28 U.S.C. 2412(b) 4

28 U.S.C. 2412(d) 4

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-54

LIBRARY OF CONGRESS, ET AL., PETITIONERS

v.

TOMMY SHAW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

Respondent devotes most of his brief in opposition to a defense of the merits of the court of appeals' ruling. He does not deny, however, that the question presented here is a recurring and significant one. He points to nothing in 42 U.S.C. 2000e-5(k) that expressly—or, for that matter, impliedly—adverts to the availability of interest on fee awards against the United States. And he fails even to challenge our submission that the decision below cannot be reconciled in principle with the holdings of a number of other courts of appeals. Respondent accordingly offers no reason for this Court to deny review.

1. Respondent maintains at the outset that an adjustment to a fee award "to compensate for delay in payment" is a component of a reasonable attorneys' fee. Br. in Opp. 7.[1]

[1]In fact, as Judge Ginsburg suggested in dissent below, the court here did not adjust the award upward "as part" of a reasonable fee; it simply added interest on top of the fee. See Pet. App. 38a-39a, 53a-54a.

That interest may be available on late fee payments in private sector suits under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, however, is wholly beside the point, for the "no-interest rule" (see Pet. 9-10) historically has been based on the proposition that "delay or default cannot be attributed to the government." *United States* v. *Sherman,* 98 U.S. 565, 568 (1878). Absent an express waiver, any portion of a fee award that compensates for the "belated receipt of [funds]" therefore is barred by sovereign immunity. *Saunders* v. *Claytor,* 629 F.2d 596, 598 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981).

This is a principle that routinely has been applied by this Court. The term "just compensation," for example, ordinarily is understood to involve an interest component; where takings in the constitutional sense are involved, the Just Compensation Clause *requires* payment of interest. See *United States* v. *Alcea Band of Tillamooks,* 341 U.S. 48, 49 (1951). Pointing to the "no-interest rule," however, the Court consistently has held that interest is unavailable under statutes or contracts directing the United States to pay "just compensation" to private parties, reasoning that Congress should not be deemed by the use of general language to have waived the government's immunity against claims grounded on a loss that is attributable to delay in payment. See, *e.g., ibid.; Albrecht* v. *United States,* 329 U.S. 599, 605 (1947); *United States* v. *Goltra,* 312 U.S. 203, 207-211 (1941).

2. Respondent also maintains that Congress in enacting the Equal Employment Opportunity Act of 1972 intended to place federal employee Title VII plaintiffs on precisely the same footing as their private sector counterparts, and in that way to "effect a complete, total, and absolute waiver [of the federal government's] sovereign immunity with regard to the remedies obtainable under Title VII." Br. in Opp. 13. As respondent implicitly acknowledges (*id.* at 24 n.17),

however, so far as awards of interest are concerned,[2] his reading of the statute has been emphatically rejected by the courts. Thus, each of the six courts of appeals that have considered the question has held that Title VII plaintiffs may not recover interest on back pay awards against the United States. See cases cited at Pet. 15. Yet respondent makes no attempt to grapple with the obvious anomaly in a scheme that withholds interest from plaintiffs while making it available to their attorneys.[3]

3. Similarly, respondent attempts to distinguish this Court's decisions propounding the "no-interest rule" on the ground that they involved statutes that did not "abrogate sovereign immunity in its entirety." Br. in Opp. 14. But this argument simply assumes its conclusion: that 42 U.S.C. 2000e-5(k) *does* waive the government's sovereign immunity as to interest. In fact, the very point of the "no-interest rule" is that statutory language, no matter how broad, should not be deemed to make interest available against the United States unless Congress affirmatively and unambiguously signaled an intent to do so. See Pet. 8-11.

Respondent also suggests that the "no-interest rule" bears only on the construction of statutes that are uniquely

---

[2]Even apart from the interest issue, respondent's assertion that Title VII accords public and private sector plaintiffs completely equivalent treatment is open to question. See, *e.g., Brown* v. *GSA,* 425 U.S. 820, 832-834 (1976) (while private sector plaintiffs may pursue alternative remedies for employment discrimination, Title VII is the exclusive remedy for federal employee plaintiffs). Cf. *Lehman* v. *Nakshian,* 453 U.S. 156, 163 (1981) (language in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 633a, that had been held to make jury trials available to private sector plaintiffs did not waive the government's sovereign immunity to the extent of permitting jury trials in ADEA suits against the United States).

[3]To the contrary, respondent simply asserts that all of the courts of appeals have erred in denying interest to Title VII plaintiffs. Br. in Opp. 24 n.17.

applicable to actions against the government. Br. in Opp. 14-20. Again, however, respondent's novel distinction finds no support in the decisions of this or other courts. Rather, the "no-interest rule" grew out of the notion that delay cannot be attributed to the sovereign; that principle is applicable to all waivers of immunity that do not expressly provide for interest.

The courts—other than the one below—accordingly have recognized the applicability of the "no-interest rule" in situations analogous to the one here. As noted above, for example, six courts of appeals have held that the rule bars federal employee Title VII plaintiffs from receiving interest on their back pay awards. Two other courts of appeals have ruled that the attorneys' fee provision of the Equal Access to Justice Act (EAJA) (28 U.S.C. 2412(b)), which is virtually identical to 42 U.S.C. 2000e-5(k), does not permit an award of interest against the United States. *Arvin* v. *United States,* 742 U.S. 1301, 1304 (11th Cir. 1984); *Knights of the Ku Klux Klan* v. *East Baton Rouge Parish School Board,* 735 F.2d 895, 902 (5th Cir. 1984).[4] See Pet. 14-15, 16. And this Court has long applied the "no-interest rule" without hesitation when, in adjustments of "mutual claims" between the United States and private parties, the United States obtained interest on *its* claims. *United States* v. *North American Trans. & Trading Co.,* 253 U.S. 330, 336 (1920); *United States* v. *Verdier,* 164 U.S. 213, 218-219 (1896).[5]

---

[4]Citing *Arvin* and *East Baton Rouge,* the Ninth Circuit recently ruled that the United States may not be held liable for interest under subsection (d) of the EAJA, 28 U.S.C. 2412(d), which permits the award of attorneys' fees against the United States when the government's position was not "substantially justified." *International Woodworkers of America, AFL-CIO, Local 3-98* v. *Donovan,* No. 84-1887 (Aug. 28, 1985).

[5]Respondent suggests (Br. in Opp. 22-23) that the decision below follows from *Standard Oil Co.* v. *United States,* 267 U.S. 76 (1925), which held the United States liable for interest on insurance policies

4. Finally, respondent fails even to suggest that the decision below can be reconciled in principle under any theory with the decisions relating to interest that have been rendered by the other courts of appeals. And such a claim would, in any event, be unavailing. The court below itself recognized that its ruling cannot be squared with the reading given the EAJA by *Arvin* and *East Baton Rouge.* Pet. App. 29a-30a & n.107; see also *id.* at 56a n.14 (Ginsburg, J., dissenting). And respondent acknowledges that his analysis of Title VII requires rejection of the decisions of those courts of appeals that have held interest unavailable for plaintiffs. Br. in Opp. 24 n.17.

In short, respondent's argument—like the decision below—proposes a novel and far-reaching reformulation of the sovereign immunity doctrine. Despite his contentions to the contrary (see Br. in Opp. 2-5, 8-10), then, it is the ruling of the court of appeals, rather than the submission of the government, that infringes on the congressional prerogative by making the courts the arbiters of when the federal government's sovereign immunity will be waived.

For the foregoing reasons and the reasons stated in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

CHARLES FRIED
Acting Solicitor General

SEPTEMBER 1985

---

issued as part of a for-profit commercial venture. That holding, however, turned on the specific contracts at issue (see *United States* v. *Worley,* 281 U.S. 339, 342 (1930)) and, as Judge Ginsburg noted in dissent below (Pet. App. 49a n.8), on the commercial nature of the government's insurance activities. Neither of those factors is present here.

DOJ-1985-09

PETITIONER'S

BRIEF

(4)

No. 85-54

In the Supreme Court of the United States

OCTOBER TERM, 1985

LIBRARY OF CONGRESS, ET AL., PETITIONERS

v.

TOMMY SHAW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

488

QUESTION PRESENTED

Whether Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), which makes the federal government liable to prevailing Title VII plaintiffs for attorneys' fees, waives sovereign immunity so as to permit the recovery of interest on attorneys' fee awards.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, petitioners include Daniel J. Boorstin, Librarian of Congress; Donald C. Curran, Associate Librarian of Congress; and John J. Kominsky, General Counsel, Library of Congress.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statutes involved	2
Statement	2
Summary of argument	7
Argument:	
Congress has not waived the government's sovereign immunity from interest on awards of attorneys' fees under Title VII of the Civil Rights Act of 1964	10
A. Interest may be recovered from the government only when such interest awards have been affirmatively and expressly authorized by Congress	11
B. 42 U.S.C. 2000e-5(k) does not waive the "no-interest rule"	17
C. 42 U.S.C. 2000e-5(k) may not be read to authorize delay adjustments of any sort to fee awards	26
Conclusion	29

TABLE OF AUTHORITIES

Cases:

Albrecht v. *United States*, 329 U.S. 599	13, 14
Arvin v. *United States*, 742 F.2d 1301	16, 22, 25
Blake v. *Califano*, 626 F.2d 891	14, 15, 18, 19, 20, 21, 27
Boston Sand Co. v. *United States*, 278 U.S. 41	11, 14, 16
Canadian Aviator Ltd. v. *United States*, 324 U.S. 215	17
Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412	19, 20
Cherokee Nation v. *United States*, 270 U.S. 476	14

Cases—Continued: Page

Copeland v. *Marshall*, 641 F.2d 880 ..... 3, 4, 25, 28
Copper Liquor, Inc. v. *Adolph Coors Co.*, 701 F.2d 542 23
deWeever v. *United States*, 618 F.2d 685 21
District of Columbia v. *Johnson*, 165 U.S. 330 14
Fischer v. *Adams*, 572 F.2d 406 21
General Motors Corp. v. *Devex Corp.* 461 U.S. 648 23
Gordon v. *United States*, 74 U.S. (7 Wall.) 188 14
Holly v. *Chasen*, 639 F.2d 795, cert. denied, 454 U.S. 822 ..... 13, 15, 22
Indian Towing Co. v. *United States*, 350 U.S. 61 17
Johnson v. *University College of the University of Alabama*, 706 F.2d 1205, cert. denied, 464 U.S. 994 28
Knights of the Ku Klux Klan v. *East Baton Rouge Parish School Board*, 735 F.2d 895 ..... 16, 25
Lehman v. *Nakshian*, 453 U.S. 156 ..... 11, 15, 20, 22, 23
McMahon v. *United States*, 342 U.S. 25 11
Murray v. *Weinberger*, 741 F.2d 1423 ..... 6, 28
National Ass'n of Concerned Veterans v. *Secretary of Defense*, 675 F.2d 1319 28
Peoria Tribe v. *United States*, 390 U.S. 468 13-14
Perkins v. *Standard Oil*, 487 F.2d 672 23
Ramos v. *Lamm*, 713 F.2d 546 28
Richerson v. *Jones*, 551 F.2d 918 21
Rodgers v. *United States*, 332 U.S. 371 23
Rosenman v. *United States*, 323 U.S. 658 14
Ruckelshaus v. *Sierra Club*, 463 U.S. 680 23
Saunders v. *Claytor*, 629 F.2d 596, cert. denied, 450 U.S. 980 ..... 21, 27
Segar v. *Smith*, 738 F.2d 1249, cert. denied, No. 84-1200 (May 20, 1985) 21
Sheckels v. *District of Columbia*, 246 U.S. 338 14
Sherman v. *United States*, 98 U.S. 565 ..... 10, 12, 14
Smyth v. *United States*, 302 U.S. 329 ..... 7, 13
Soriano v. *United States*, 352 U.S. 270 11
Standard Oil Co. v. *United States*, 267 U.S. 76 17
The Scotland, 118 U.S. 507 16
Tillson v. *United States*, 100 U.S. 43 ..... 12, 14, 15
United States v. *Alcea Band of Tillamooks*, 341 U.S. 48 ..... 12, 13, 14, 15

Cases—Continued: Page

United States v. *Commonwealth & Dominion Line, Ltd.*, 278 U.S. 427 14
United States v. *Delaware Tribe of Indians*, 427 F.2d 1218 27
United States v. *Goltra*, 312 U.S. 203 ..... 14, 15
United States v. *King*, 395 U.S. 1 15
United States v. *Louisiana*, 446 U.S. 253 ..... 7, 13, 15
United States v. *Mescalero Apache Tribe*, 518 F.2d 1309, cert. denied, 425 U.S. 911 ..... 18, 27
United States v. *North Carolina*, 136 U.S. 211 14
United States v. *North American Co.*, 253 U.S. 330 ..... 14, 15, 18, 27
United States v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 ..... 13, 14
United States v. *Rogers*, 255 U.S. 163 14
United States v. *Sherwood*, 312 U.S. 584 11
United States v. *Testan*, 424 U.S. 392 11
United States v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 14
United States v. *Verdier*, 164 U.S. 213 15
United States v. *Worley*, 281 U.S. 339 ..... 14, 17
United States v. *Yellow Cab Co.*, 340 U.S. 543 17
United States ex rel. Angarica v. *Bayard*, 127 U.S. 251 13

Constitution, statutes and regulations:

U.S. Const. Amend. V (Just Compensation Clause) 13
Act of May 15, 1922, ch. 192, 42 Stat. 1590 16
Age Discrimination in Employment Act, 29 U.S.C. 633a 15, 23
Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* 3
42 U.S.C. 2000e-5(g) 21
42 U.S.C. 2000e-5(k) ..... *passim*
42 U.S.C. 2000e-16(d) 2, 3, 20
Court of Claims Act of 1863, ch. 92, § 7, 12 Stat. 766 ..... 7, 13
Equal Access to Justice Act:
28 U.S.C. 2412(b) 9, 16, 24
28 U.S.C. 2412(d) 24

Constitution, statutes and regulations—Continued: Page

Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 *et seq.* 19
War Risk Insurance Act of 1914, ch. 293, 38 Stat. 711 *et seq.* 17
15 U.S.C. 15 23
26 U.S.C. 7426(g) 22
28 U.S.C. 1961(c)(2) 22
28 U.S.C. 2411 22
28 U.S.C. 2516(a) 7, 13, 14, 22
28 U.S.C. 2516(b) 22
31 U.S.C. 1304(b)(1)(A) 22, 24
31 U.S.C. 1304(b)(1)(B) 22
31 U.S.C. 3728(c) 22
40 U.S.C. 258a 22
Pub. L. No. 88-352, § 706(k), 78 Stat. 261 19
Pub. L. No. 99-80, 99 Stat. 183 *et seq.*:
§ 2(e), 99 Stat. 185-186 24
§ 6, 99 Stat. 186 24

Miscellaneous:

H.R. Rep. 98-992, 98th Cong., 2d Sess. (1984) 24
H.R. Rep. 99-120, 99th Cong., 1st Sess. (1985) 24
Letter from the Comptroller General to Senator Thurmond, B-40342.4 (Oct. 5, 1984) 24
1 Op. Atty. Gen.:
p. 268 (1819) 7, 12
p. 722 (1825) 12
2 Op. Atty. Gen.:
p. 390 (1830) 12
p. 463 (1831) 12
3 Op. Atty. Gen. 635 (1841) 12
4 Op. Atty. Gen.:
p. 14 (1842) 12
p. 136 (1842) 12, 25
p. 286 (1843) 12
5 Op. Atty. Gen.:
p. 138 (1849) 12
p. 227 (1850) 12
7 Op. Atty. Gen. 523 (1855) 12

Miscellaneous—Continued: Page

Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* (Comm. Print 1972) 19
20 Weekly Comp. Pres. Doc. 1814 (Nov. 8, 1984) 24

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-54

LIBRARY OF CONGRESS, ET AL., PETITIONERS

v.

TOMMY SHAW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-56a) is reported at 747 F.2d 1469. The opinion of the district court (Pet. App. 57a-70a) is unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 71a-72a) was entered on November 6, 1984; an order denying rehearing (Pet. App. 73a-75a) was entered on February 20, 1985. On May 8, 1985, the Chief

Justice extended the time within which to file a petition for a writ of certiorari to June 27, 1985. On June 21, 1985, the Chief Justice further extended the time for filing the petition to July 12, 1985. The petition was filed on that date and was granted on October 7, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

42 U.S.C. 2000e-5(k) provides:

> In any action or proceeding under this subchapter the court, in its discretion, may allow the prevailing party, other than the [Equal Employment Opportunity] Commission or the United States, a reasonable attorney's fee as part of the costs, and the Commission and the United States shall be liable for costs the same as a private person.

42 U.S.C. 2000e-16(d) provides:

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

STATEMENT

1. In 1976 and 1977 respondent filed administrative complaints charging his employer, the Library of Congress (Library), with racial discrimination. These complaints were settled in August 1978, when the Library agreed to award respondent back pay and to take certain other remedial measures. Pet. App. 2a-3a. Shortly afterwards, however, upon the advice of the Comptroller General, the Library informed respondent that it lacked the authority to provide such

relief absent a specific finding of racial discrimination (*id.* at 3a & n.7). Respondent then brought suit, arguing that Title VII of the Civil Rights Act of 1964, as amended by the Equal Employment Opportunity Act of 1972 , Tit. VII, 42 U.S.C. 2000e *et seq.* (Title VII), authorized the Library to accord the relief specified in the settlement agreement (Pet. App. 3a-4a).

On September 14, 1979, the United States District Court for the District of Columbia ruled in respondent's favor on the merits (see Pet. App. 4a). The court accordingly held (see *ibid.*) that respondent's attorney [1] was entitled to an award of fees under the Title VII attorneys' fees provision, which states that "the court, in its discretion, may allow the prevailing party * * * a reasonable attorney's fee as part of the costs, and * * * the United States shall be liable for costs the same as a private person." 42 U.S.C. 2000e-5(k).[2] But the district court declined to set the fee award pending a decision by the en banc District of Columbia Circuit in *Copeland* v. *Marshall*, 641 F.2d 880 (1980), which the district court anticipated would provide guidance on the standards applicable in the computation of attorneys' fees. See

---

[1] The attorney whose fee is at issue here, Shalon Ralph, represented respondent in 1978, while the case was in its administrative phase; he also provided some assistance during the district court proceedings (Pet. App. 4a n.13). The fee claims of respondent's other counsel have been settled (*ibid.*). References to "respondent's attorney" in this brief therefore are directed only at Ralph.

[2] Section 2000e-5(k) is made applicable to federal agency defendants by 42 U.S.C. 2000e-16(d), which provides that "[t]he provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought" against government employers under Title VII. See pages 19-20, *infra*.

Pet. App. 4a, 60a. The court of appeals' decision in *Copeland* ultimately issued almost one year later, on September 2, 1980.

Over one additional year passed before the district court, on November 4, 1981, issued an order setting fees and awarding them to respondent's attorney. The court began by fixing the so-called "lodestar" (see Pet. App. 2a n.2) based on the number of hours worked and the attorney's 1978 hourly rate (*id.* at 5a, 62a-66a). After making a variety of adjustments to the lodestar that are not relevant here (see *id.* at 5a, 66a-68a), the district court declared that "[t]his case should have ended in August 1978, or at the latest in November of that year. If [respondent's attorney] had been compensated at about that time, he could have invested the money at an average yield of not less than 10% per year. It is the fault of neither [respondent] nor [his attorney] that payment was not made sooner." *Id.* at 68a (footnote omitted). Because three years had passed since late 1978, the court accordingly ordered "an upward adjustment [of the fee] of 30% for delay" (*ibid.*).

2. On appeal, a divided panel of the court of appeals rejected the Library's contention that Congress in Section 2000e-5(k) had not authorized the award of interest against the United States, and that the 30% delay adjustment accordingly was improper. The panel majority acknowledged that the delay adjustment was interest because it "was designed to reimburse [respondent's] counsel for the decrease in value of his uncollected legal fee between the date on which he concluded his legal services and the court's estimated date of likely actual receipt" (Pet. App. 11a (footnote omitted)); see *id.* at 12a-13a & n.41). And the court acknowledged the force of the so-called

"no-interest rule"—that the United States may not be held liable for interest in the absence of an express waiver of its sovereign immunity (*id.* at 13a).

The court of appeals held, however, that Section 2000e-5(k) is such a waiver. The court noted that private parties generally may be held liable for interest on fee awards under Title VII, and that Title VII makes the United States liable for costs "the same as a private person." This, the court concluded, is an "express" statutory waiver as to interest, the range of which "is defined in unmistakable language." Pet. App. 15a. The court also based its holding on what it termed an alternative ground: that "the traditional rigor of the sovereign-immunity doctrine [is relaxed] when a statute measures the liability of the United States by that of private persons" (*id.* at 24a).[3]

---

[3] Although the court of appeals thus held that attorneys may be awarded interest under Section 2000e-5(k), it nonetheless remanded the case to the district court for further proceedings. In the majority's view, "a delay-in-payment adjustment [is] appropriate only where the lodestar is the per-hour charge to clients who pay when billed" (Pet. App. 8a n.28). The court suggested, however, that a lodestar may "represent[] a higher rate charged clients who sue under fee-shifting statutes," in which case the figure might already "ha[ve] * * * taken into account the pecuniary disadvantage resulting from the lengthy wait for payment ordinarily encountered under such statutes" (*ibid.*). In such circumstances, the panel concluded, "an upward adjustment for delay would * * * result in the attorney being paid twice for the delay" (*ibid.*). The court of appeals therefore instructed the district court, on remand, to determine whether the lodestar had been based on a rate that "has already taken into account the pecuniary disadvantage resulting from the lengthy wait for payment" (*id.* at 37a). If so, the district court was to vacate its 30% delay adjustment (*ibid.*). The court of appeals also noted that, following oral

Judge Ginsburg dissented. She agreed that the 30% adjustment is interest, but concluded that nothing in either Section 2000e-5(k) or its legislative history so much as adverts to an intent to overcome the "no-interest rule" (Pet. App. 41a). Judge Ginsburg also noted that sovereign immunity prevents Title VII *plaintiffs* from recovering interest on back pay awards entered against the government, and found it unlikely that Congress would have given Title VII *attorneys* more favorable treatment than their clients (*id.* at 42a-44a). She therefore concluded that Congress could not " 'plainly' [have] resolved an immunity waiver issue never even framed in the course of its deliberations" (*id.* at 41a).[4]

---

argument in the case, it had ordered the government to pay the undisputed portion of the attorney's fee (*id.* at 6a n.24); that payment has since been made.

[4] Although Judge Ginsburg thus found no justification in the statute for an award of interest against the United States, she suggested that *Murray* v. *Weinberger*, 741 F.2d 1423 (D.C. Cir. 1984), compelled the conclusion that there is a meaningful distinction between "interest" and an "adjustment for delay in receipt of payment" (Pet. App. 38a). She explained: "[j]ust as an attorney setting an hourly rate in a contingent fee case may factor in the risk that the cause may not prevail, so too an attorney embarking on services for which he or she anticipates payment ultimately, but not promptly, may factor in the expected delay" (*id.* at 38a-39a). Judge Ginsburg therefore would require a district court to determine whether an attorney's historic rates (those that he charged at the time that he did the work at issue) were enhanced by such a delay factor. If so, the attorney would be entitled to reimbursement at that enhanced rate—but not to any additional recovery because of actual delay in receiving fees. If the historic rate did not contain a component for anticipated delay in the receipt of fees, however, Judge Ginsburg in an "appropriate" case would permit the district court to use

The Library's petition for rehearing en banc was denied, with Judges Ginsburg, Bork, Scalia, and Starr dissenting (Pet. App. 73a-75a).

SUMMARY OF ARGUMENT

1. From the earliest reported treatment of the issue, it has been the law that interest may not be awarded on claims against the United States unless Congress affirmatively considered the interest question and unambiguously expressed its intention that interest should be available. That principle already was well-established in the executive agencies in 1819 (see 1 Op. Atty. Gen. 268 (1819)), and it was acknowledged by Congress itself at the time of the creation of the Court of Claims. See Court of Claims Act of 1863, ch. 92, § 7, 12 Stat. 766 (current version at 28 U.S.C. 2516(a)). Since that time, the "no-interest rule" has been repeatedly propounded by this Court: "in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." *United States* v. *Louisiana*, 446 U.S. 253, 264-265 (1980), quoting *Smyth* v. *United States*, 302 U.S. 329, 353 (1937).

This rule has been applied with essentially unmitigated rigor. This and other courts, for example, have held interest unavailable against the United States under statutory language that regularly is used to make private defendants liable for interest. Similarly, the United States cannot be ordered to pay interest under the authority of statutory provisions

---

current market rates rather than historic rates in computing the lodestar, if doing so would not generate a windfall for the attorney. *Id.* at 50a-53a.

awarding "just compensation"—even though "just compensation" for constitutional purposes has long been understood to include an interest component. And the courts have held that statutes basing the liability of the government upon that of private parties may not be read to authorize interest awards.

2. The court of appeals' analysis cannot be squared with this settled law. 42 U.S.C. 2000e-5(k) makes no reference to interest, express or otherwise. And an examination of the provision's legislative history indicates that the availability of interest never even was framed in the course of Congress's deliberations, let alone addressed and resolved. Indeed, the specific language relied upon by the court of appeals—the "same as a private person" proviso—was placed in Section 2000e-5(k) in 1964, before the government was subject to Title VII as a defendant, presumably to make the United States liable as a plaintiff for the fees of prevailing defendants. In that context, the language was intended simply to waive the sovereign immunity of the government so as to make it liable for fees to certain prevailing parties, just as private plaintiffs are in some instances liable for the fees of prevailing defendants.

In fact, Title VII contains considerable evidence that the congressional scheme should not be intepreted to permit attorneys to obtain interest on their fees in cases against the government. While Title VII plaintiffs may be awarded interest on back pay awards against private employers, it is settled law that interest does not run on back pay recovered from a government employer. Had Congress given any attention to the interest question—and an award of interest could have been affirmatively authorized only if Congress did so—it is difficult to imagine that, in a single legislative package, it would have chosen to accord plaintiffs' lawyers more favorable treatment than that accorded plaintiffs themselves.

The court of appeals' analysis, moreover, disregards the entire body of legislation in which Congress has permitted interest to run on substantive recoveries against the United States. When it has chosen to make interest available Congress has done so explicitly, and has spelled out the conditions upon, and the rate governing, such awards. This is, in fact, precisely the approach that Congress recently took in amending the Equal Access to Justice Act, 28 U.S.C. 2412(b)—a statute that is virtually identical to Section 2000e-5(k)—to provide expressly for awards of interest. There is no reason to believe that Congress intended Section 2000e-5(k) to signal a strikingly backhanded and understated departure from its usual practice in this area. In failing to acknowledge the usual congressional approach to the availability of interest, the ruling below frustrates the purposes of the "no-interest rule" by making the government liable for unexpected liabilities arising at unanticipated times, while infringing in a direct way on the congressional prerogative to waive the government's sovereign immunity.

3. A final question here concerns the appropriate disposition of this case. Dissenting below, Judge Ginsburg suggested that, under District of Columbia Circuit precedent, the case should be returned to the district court for a determination whether the historic rates charged by respondent's attorney contained a component for anticipated delay in payment; if they did not, an upward adjustment of the lodestar to add such a component would be permissible. As the court below itself recognized, however, there is

no difference for purposes of the "no-interest rule" between such delay adjustments and interest. Because the rule is based on the proposition that delay cannot be attributed to the government (*United States* v. *Sherman*, 98 U.S. 565, 568 (1978)), it uniformly has been applied to prevent plaintiffs from holding the United States liable, absent its explicit consent, for all claims grounded on the belated receipt of funds. Any adjustment for delay to the fee awarded respondent's attorney, then, would run afoul of the "no-interest rule."

ARGUMENT

CONGRESS HAS NOT WAIVED THE GOVERNMENT'S SOVEREIGN IMMUNITY FROM INTEREST ON AWARDS OF ATTORNEYS' FEES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

The decision below announces an expansive reformulation of the sovereign immunity doctrine. For well over a century, this Court, executive agencies, and Congress itself consistently have explained that federal statutes should not be deemed to allow interest to run on recoveries against the United States unless Congress affirmatively desired that result and announced its intentions in unambiguous terms. The court of appeals' contrary conclusion—that 42 U.S.C. 2000e-5(k) effected a waiver of sovereign immunity as to interest despite the absence of anything in the statute or its legislative history indicating an affirmative intention on the part of Congress to do so—cannot be reconciled with this settled law.

By departing from the controlling principle in this area, the court below has opened the federal treasury to a potentially wide range of monetary awards that were unanticipated, and not consciously authorized,

by Congress. And it has effectively substituted the judgment of the courts for that of Congress in determining when the federal government's sovereign immunity should be deemed waived. The court of appeals thus disregarded this Court's repeated admonition that the disposition of claims against the United States for interest must "start with the rule that the United States is not liable to interest except where it assumes liability by contract or by the express words of a statute." *Boston Sand Co.* v. *United States*, 278 U.S. 41, 47 (1928).

A. Interest May Be Recovered From The Government Only When Such Interest Awards Have Been Affirmatively And Expressly Authorized By Congress

It is common ground that an award of interest against the government is permissible only if Congress waives the government's sovereign immunity as to such an award. In determining whether Congress has done so, this Court has indicated that analysis should begin with the principle that "[w]aivers of immunity must be 'construed strictly in favor of the sovereign,' *McMahon* v. *United States*, 342 U.S. 25, 27 (1951), and not 'enlarge[d] . . . beyond what the language requires,' *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927)." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983).[5]

This case involves a principle related to but distinct from the government's basic immunity from suit: as the court below acknowledged (Pet. App. 13a), even when Congress has expressly permitted

---

[5] Accord *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981); *United States* v. *Testan*, 424 U.S. 392, 400-401 (1976); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957); *United States* v. *Sherwood*, 312 U.S. 584, 586-587, 590 (1941).

collection on substantive claims against the United States, the " 'traditional rule' [is] that interest on [such claims] cannot be recovered" unless the awarding of interest was affirmatively and separately contemplated by Congress. *United States* v. *Alcea Band of Tillamooks*, 341 U.S. 48, 49 (1951). Grounded on the proposition that "delay or default cannot be attributed to the government" (*United States* v. *Sherman*, 98 U.S. 565, 568 (1878); see 5 Op. Atty. Gen. 138 (1849); 2 Op. Atty. Gen. 463, 464 (1831)), this "no-interest rule" has been consistently applied from the earliest reported treatment of claims against the United States.

As early as 1819, the "usual practice of the Treasury Department" was to decline to pay interest unless Congress in terms directed its payment or affirmatively intended it to be allowed (1 Op. Atty. Gen. 268); it was "confidently believed, that in all the numerous acts of Congress for the liquidation and settlement of claims against the government, there is no instance in which interest has been allowed, except only where those acts have expressly directed or authorized its allowance." 3 Op. Atty. Gen. 635, 639 (1841). While the "equitable principle that interest is an incident to the debt" was recognized at the time, "[t]he exception in favor of the government [was] established by the policy of society, and for the protection of the public." 4 Op. Atty. 136, 137 (1842). Accord *Tillson* v. *United States*, 100 U.S. 43, 47 (1879); 7 Op. Atty. Gen. 523, 524-527 (1855); 5 Op. Atty. Gen. 227, 231 (1850); 4 Op. Atty. Gen. 286, 293 (1843); 4 Op. Atty. Gen. 14, 16 (1842); 2 Op. Atty. Gen. 390, 392 (1830); 1 Op. Atty Gen. 722, 731 (1825). Congress in terms recognized this traditional rule in 1863, when it provided that the Court of Claims could award interest against the government only if expressly authorized to do so by statute or contract. Court of Claims Act of 1863, ch. 92, § 7, 12 Stat. 766 (current version at 28 U.S.C. 2516(a)).

Against this background, some 100 years ago this Court routinely was relying on the already "well-settled principle, that the United States are not liable to pay interest on claims against them, in the absence of express statutory provision to that effect." *United States ex rel. Angarica* v. *Bayard*, 127 U.S. 251, 260 (1888). And since that time, the Court repeatedly has reaffirmed the notion that, "[a]part from constitutional requirements, in the absence of specific provision by contract or statute, or 'express consent . . . by Congress,' interest does not run on a claim against the United States." *United States* v. *Louisiana*, 446 U.S. 253, 264-265 (1980), quoting *Smyth* v. *United States*, 302 U.S. 329, 353 (1937).[6] Thus, a waiver of immunity is effective only "where interest is given expressly by an act of Congress, either by the name of interest or by that of damages." *Bayard*, 127 U.S. at 260. "The waiver cannot be by implication or by use of ambiguous language" (*Holly* v. *Chasen*, 639 F.2d 795, 797 (D.C. Cir.), cert. denied, 454 U.S. 822 (1981)); the "consent necessary to waive the traditional immunity must be express, and it must be strictly construed." *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 659 (1947). Accord *Peoria Tribe* v. *United States*, 390 U.S. 468,

[6] The "constitutional requirements" arise in takings under the Just Compensation Clause; the Court has held that just compensation must include a payment for interest. See, *e.g.*, *Tillamooks*, 341 U.S. at 49; *Albrecht* v. *United States*, 329 U.S. 599, 605 (1947); *Smyth*, 302 U.S. at 353-354.

470 (1968) (dictum); *Tillamooks*, 341 U.S. at 49; *Albrecht* v. *United States*, 329 U.S. 599, 605 (1947); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 590 (1947); *Rosenman* v. *United States*, 323 U.S. 658, 663 (1945) (dictum); *United States* v. *Goltra*, 312 U.S. 203, 207 (1941); *United States* v. *Commonwealth & Dominion Line, Ltd.*, 278 U.S. 427, 428-429 (1929); *United States* v. *Worley*, 281 U.S. 339, 341 (1930); *Boston Sand Co.* v. *United States*, 278 U.S. 41, 46 (1928); *Cherokee Nation* v. *United States*, 270 U.S. 476, 487, 490 (1926); *United States* v. *Rogers*, 255 U.S. 163, 169 (1921) (dictum); *United States* v. *North American Co.*, 253 U.S. 330, 336 (1920); *Sheckels* v. *District of Columbia*, 246 U.S. 338, 340 (1918); *District of Columbia* v. *Johnson*, 165 U.S. 330, 338 (1897); *United States* v. *North Carolina*, 136 U.S. 211, 216 (1890); *Tillson*, 100 U.S. at 46; *United States* v. *Sherman*, 98 U.S. 565, 567-568 (1878). See generally *Gordon* v. *United States*, 74 U.S. (7 Wall.) 188, 193 (1868).[7]

This principle has been applied with unmitigated rigor: the courts have held virtually without exception that the government's immunity to awards of interest can be found to have been waived only when Congress affirmatively considered the interest question and unambiguously expressed its intention that interest should be available. See *Holly*, 639 F.2d at 797; Pet. App. 43a (Ginsburg, J., dissenting). Cf. *Nakshian*, 453 U.S. at 168; *United States* v. *King*, 395 U.S. 1, 4 (1969). This and other courts therefore have held, for example, that interest could not be awarded when the United States was required to disgorge funds under an agreement that had permitted it to collect and use revenues from disputed lands pending a determination of ownership (*United States* v. *Louisiana*, 446 U.S. at 261-264), or when, "in the adjustment of mutual claims" with a private party, the government was awarded interest on *its* claims. *North American Co.*, 253 U.S. at 336; *United States* v. *Verdier*, 164 U.S. 213, 218-219 (1896). See Pet. App. 45a (Ginsburg., J., dissenting).

Similarly, interest has been ruled unavailable under statutes or contracts directing the United States to pay the "amount equitably due" (*Tillson*, 100 U.S. at 46), or "any * * * equitable relief * * * the court deems appropriate" (*Blake* v. *California*, 626 F.2d 891, 893 (1980)), although identical language is regularly held to make private defendants liable for interest. See *Blake*, 626 F.2d at 893 & n.3. Cf. *Nakshian*, 453 U.S. at 163 (language in the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. 633a, that had been held to make jury trials available to private sector plaintiffs did not waive the government's sovereign immunity to the extent of permitting jury trials in ADEA suits against the United States). And the United States cannot be ordered to pay interest under the authority of statutory provisions awarding "just compensation" (*e.g.*, *Tillamooks*, 341 U.S. at 49; *Goltra*, 312 U.S. at 207-211), even though "just compensation" for constitutional pur-

[7] Several of these cases involved the construction of predecessors to 28 U.S.C. 2516(a), which permits an award of interest on judgments against the United States in the Claims Court "only under a contract or Act of Congress expressly providing for payment thereof." The Court repeatedly has emphasized, however, that the statute simply "codifies the traditional rule" (*N.Y. Rayon*, 329 U.S. at 658) that the government is immune "from the burden of interest unless it is specifically agreed upon by contract or imposed by legislation." *Goltra*, 312 U.S. at 207 (footnote omitted). See *Thayer*, 329 U.S. at 588; *Blake* v. *Califano*, 626 F.2d 891, 894 n.6 (1980).

poses has long been understood to *require* payment of interest (see note 6, *supra*).

Indeed, the Court has indicated that even statutory language basing federal liability "'upon the same principle and measure * * * as in like cases * * * between private parties'" generally "ha[s] been understood * * * not to carry interest." *Boston Sand*, 278 U.S. at 46, 47 (quoting Act of May 15, 1922, ch. 192, 42 Stat. 1590). While the Court in *Boston Sand* also pointed to the legislative history of the Act of May 15 in holding interest unavailable in an award under that statute (see 278 U.S. at 47), the Court concluded that "the usage of Congress simply shows that it has spoken with careful precision, that its words mark the exact spot at which it stops, and that it distinguishes between the damages * * * and the later loss caused by delay in paying for [the damages],—between damages and 'the allowance of interest on damages.'" 278 U.S. at 48, quoting *The Scotland*, 118 U.S. 507, 518 (1886). Recognizing that "Congress has been accustomed" to this use of language, two courts of appeals also have held that awards of interest against the government are not authorized by the Equal Access to Justice Act (EAJA) (28 U.S.C. 2412(b)) (making the United States liable for fees "to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award"), which in relevant part is virtually identical to Section 2000e-5(k). *Arvin* v. *United States*, 742 F.2d 1301, 1304 (11th Cir. 1984); *Knights of the Ku Klux Klan* v. *East Baton Rouge Parish School Board*, 735 F.2d 895, 902 (5th Cir. 1984).

There is thus no merit to the court of appeals' suggestion that the traditional "no-interest rule" is inapplicable when the statute at issue "measures the liability of the United States by that of private persons" (Pet. App. 24a-36a). None of the decisions cited by the court of appeals on this point involved an award of interest, as to which a discrete, express waiver of the government's immunity must be found. Instead, those decisions stand only for the unexceptional proposition that the usual substantive rules apply to shape the government's liability once it has waived its basic immunity from suit. See, *e.g.*, *Canadian Aviator, Ltd.* v. *United States*, 324 U.S. 215, 222 (1945) (cited at Pet. App. 29a); *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955) (cited at Pet. App. 27a); *United States* v. *Yellow Cab Co.*, 340 U.S. 543, 548 (1951) (cited at Pet. App. 28a).[8]

B. 42 U.S.C. 2000e-5(k) Does Not Waive The "No-Interest Rule"

1. Against this background, the court of appeals found that Section 2000e-5(k) evidences an express congressional authorization of interest awards because private employers may be held liable for inter-

[8] Nor does *Standard Oil Co.* v. *United States*, 267 U.S. 76 (1925) (cited at Pet. App. 33a-34a) provide support for the court of appeals' conclusion. That decision held the United States liable for interest on insurance policies issued under the War Risk Insurance Act of 1914, ch. 293, 38 Stat. 711 *et seq.*, only because that insurance program was a for-profit venture making use of standard commercial insurance contracts, so that the United States in administering the program had placed itself in the position of a nongovernmental entity. See *United States* v. *Worley*, 281 U.S. 339, 342 (1930). The Court has declined to apply *Standard Oil* outside of its specific commercial and contractual context. *Worley*, 281 U.S. at 343-344.

est on attorneys' fees under Title VII, and the statute appears to measure the liability of the United States against that of private defendants (Pet. App. 14a-16a). But Section 2000e-5(k) makes no reference to interest, express or otherwise, and in light of the settled law in this area it is hardly "logomachic" (Pet. App. 20a) to conclude that the provision does not explicitly waive the "no-interest rule."[9] To the contrary, as Judge Ginsburg observed below, "[i]f the statutory waiver here is 'express' and 'unmistakable' * * * it is remarkable that [respondent], represented by able, experienced counsel, never argued that position" before the court of appeals (Pet. App. 47a n.6).[10]

Moreover, an examination of the legislative history of Title VII indicates that the interest issue "never

---

[9] The court of appeals suggested that it would have been unnecessary for Congress to have spoken of interest explicitly in a provision such as Section 2000e-5(k) (Pet. App. 16a-17a & n.49). In fact, however, that is precisely the course that Congress has taken when providing for the award of interest in analogous statutes. See pages 21-25, *supra*.

[10] Instead, respondent "attempted to distinguish between 'an award of interest and the adjustment of a fee to ensure that it is reasonable when there is delay in its payment'" (Pet. App. 47a n.6, quoting Appellee C.A. Br. 10; see Pet. App. 10a). This proposed distinction, however, was rejected by both the majority and the dissent in the court of appeals; both opinions correctly recognized that the 30% upward adjustment—which explicitly was intended to compensate respondent's attorney for delay in the receipt of payment (see *id.* at 11a-12a)—was "interest." See generally *North American Co.*, 253 U.S. at 338; *Blake*, 626 F.2d at 895; *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976).

even [was] framed in the course of [Congress's] deliberations" on Section 2000e-5(k) (Pet. App. 41a (Ginsburg, J., dissenting)), let alone addressed and resolved. See *Blake*, 626 F.2d at 894. Section 2000e-5(k) was enacted in its current form as Section 706(k) of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 261. The legislative history of the provision is "sparse" (*Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 420 (1978)), and so far as we have been able to determine it contains not a single reference to the availability of interest. Similarly, we have been unable to uncover anything bearing on the interest question in the legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 *et seq.*, which made Title VII applicable to federal employees. See generally Staff of the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare, 92d Cong., 1st Sess., *Legislative History of the Equal Employment Opportunity Act of 1972* (Comm. Print 1972).

The absence of any evidence in the statute or its legislative history that Congress intended to make interest available should be dispositive here. Even beyond that, however, the development of Section 2000e-5(k) makes it plain that the court of appeals placed undue weight on the specific language of the provision. The court relied exclusively on the "same as a private person" proviso; it was in that phrase, the court explained, that Congress "spoke clearly enough" to waive the "no-interest rule" (Pet. App. 23a-24a, see *id.* at 16a). But the court of appeals failed to recognize that the proviso was placed in the statute many years before federal employees were permitted to sue under Title VII, presumably to make

the United States or the Equal Employment Opportunity Commission (EEOC) liable as *plaintiffs* for the fees of certain prevailing defendants. See *Christiansburg Garment Co.* v. *EEOC*, *supra*. In that context, the language relied upon by the court of appeals can most naturally be read simply as a basic waiver of the government's immunity, intended to establish that the United States is liable for the fees of prevailing defendants in the same circumstances as are private plaintiffs. Yet the very purpose of the "no-interest rule" is to establish that interest is *not* made available by such threshold and undifferentiated waivers of immunity. Cf. *Nakshian*, 453 U.S. at 160-161, 168.

The government was made liable as a *defendant* by 42 U.S.C. 2000e-16(d), which provides that many of the substantive provisions of Title VII, including Section 2000e-5(k), are applicable in civil actions against government employers. It is thus Section 2000e-16(d), in combination with Section 2000e-5(k), that Congress understood to waive the sovereign immunity of an agency defendant and make it liable for the plaintiff's "reasonable attorney's fee." That Section 2000e-5(k) already contained language equating the liability of the United States for attorneys' fees to that of a private person is a fortuity that plainly does not represent an affirmative decision to waive the "no-interest rule."

In fact, Title VII contains considerable evidence suggesting that the congressional scheme should not be interpreted to permit attorneys to obtain interest on their fees in cases against the government. While Title VII *plaintiffs* may be awarded interest on back pay awards against private employers (see, *e.g.*, *Blake*, 626 F.2d at 893 & n.3 and cases cited), it is

settled law that interest does not run on back pay recovered from the federal government. *Segar* v. *Smith*, 738 F.2d 1249, 1296 (D.C. Cir. 1984), cert. denied, No. 84-1200 (May 20, 1985); *Saunders* v. *Claytor*, 629 F.2d 596, 598 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981); *Blake*, 626 F.2d at 894; *deWeever* v. *United States*, 618 F.2d 685, 686 (10th Cir. 1980); *Fischer* v. *Adams*, 572 F.2d 406, 411 (1st Cir. 1978); *Richerson* v. *Jones*, 551 F.2d 918, 925 (3d Cir. 1977). Had Congress given any attention to the interest question—and an award of interest could have been affirmatively authorized only if Congress did so—it is difficult to imagine that, in a single legislative package, it would have chosen to accord plaintiffs' lawyers more favorable treatment than that accorded plaintiffs themselves. See Pet. App. 43a-44a (Ginsburg, J., dissenting).[11]

2. The court of appeals' analysis in this case disregards not only the structure of Title VII, but also the entire body of legislation in which Congress has permitted interest to run on substantive recoveries against the federal government. When it has chosen to make interest available, Congress—which of course legislates against the background of the "no-interest rule"—has in terms provided for awards of interest, and has spelled out the "procedures which a plaintiff

---

[11] The court of appeals explained away this anomaly by pointing to the specific language of Section 2000e-5(k) and noting that it differs from that of Title VII's back pay provision (42 U.S.C. 2000e-5(g)). See Pet. App. 9a-10a n.32, 18a n.54, 36a n.120. As we explain above, however, the "same as a private person" proviso certainly was not placed in the statute in a conscious effort to distinguish the attorneys' fee from the back pay provision.

must follow to perfect his entitlement to interest, the rate of interest which the United States will pay on each type of judgment, and the time when interest will start to run and the time it will stop." *Arvin*, 742 F.2d at 1303. See *Holly*, 639 F.2d at 797-798.[12] Yet nothing in Title VII so must as adverts to interest, let alone addresses the circumstances in which it should be available or the terms on which it should be paid. And there is no reason to believe that Congress intended Section 2000e-5(k) to signal a strikingly backhanded and understated "depart-[ure] from its usual practice in this area." *Nak-*

[12] See 26 U.S.C. 7426(g) (providing for interest in cases of wrongful levy by the Internal Revenue Service running from the date of the levy); 28 U.S.C. 1961(c)(2) (providing for interest on final judgments of the United States Court of Appeals for the Federal Circuit in claims against the United States); 28 U.S.C. 2411 (providing for interest on overpayments of federal tax running from the date of overpayment); 31 U.S.C. 1304(b)(1)(A) (appropriating funds for interest on certain district court judgments after an unsuccessful appeal by the United States "and then only from the date of filing of the transcript of the judgment with the Comptroller General through the day before the date of the mandate of affirmance"); 31 U.S.C. 1304(b)(1)(B) (appropriating funds in similar circumstances for interest on decisions of the Federal Circuit and the Claims Court after affirmance by the Supreme Court (see 28 U.S.C. 2516(b)). Cf. 31 U.S.C. 3728(c) (providing for the payment of interest on debts wrongfully withheld by the Comptroller General in certain set-off situations); 40 U.S.C. 258a (providing for the payment of interest as part of the compensation in proceedings for the taking of property by the United States). Congress also has provided that "[i]nterest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof." 28 U.S.C. 2516(a).

shian, 453 U.S. at 162.[13] See *id.* at 161, 168-169 (holding trial by jury impermissible in suits against the United States under the Age Discrimination in Employment Act, 29 U.S.C. 633a, because Congress "has almost always conditioned [waiver of sovereign immunity] upon a plaintiff's relinquishing any claim to a jury trial" and has not "affirmatively and unambiguously" provided that right in the ADEA). Cf. *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685 (1983) (footnote omitted) (when Congress is alleged to have departed from traditional fee shifting rules "a clear showing that this result was intended is required").

A notable example of Congress's usual treatment of interest questions is offered by the EAJA. As noted above, that statute provides in part that the United States is liable for fees "to the same extent that any other party would be liable." 28 U.S.C.

[13] This is particularly true where, as here, it is claimed that Congress implicitly allowed an award of *prejudgment* interest. In the absence of exceptional circumstances or a statutory provision to the contrary, the usual rule is that such interest may be awarded only from the date on which the damages were liquidated or readily calculable. See generally *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 651-652 & n.5 (1983), and cases cited; *Rodgers* v. *United States*, 332 U.S. 371, 373 (1947). Cf. *Perkins* v. *Standard Oil Co.*, 487 F.2d 672, 675 (9th Cir. 1973) (under 15 U.S.C. 15, "claims for 'reasonable' attorneys' fees, being unliquidated until they are determined by a court, are not entitled to pre-judgment interest as would be certain liquidated claims"); *Copper Liquor, Inc.* v. *Adolph Coors Co.*, 701 F.2d 542, 544 & n.3 (5th Cir. 1983) (affirming an award of interest on attorneys' fees under 15 U.S.C. 15 only from the time of the "judgment establishing the right to fees or costs"). Had Congress intended to depart from that traditional rule, it presumably "would have used explicit language to [that] effect." *Sierra Club*, 463 U.S. at 685 n.7.

2412(b). Congress nevertheless recently amended the EAJA to make interest expressly available at specified rates on fees awarded under the statute [14]—although only if the government appeals unsuccessfully from an award of fees, and then only from the date of the award through the day before the date of the mandate of affirmance. Pub. L. No. 99-80, § 2(e), 99 Stat. 185-186.[15] In doing so, Congress explained that interest was being made available to "give the United States an incentive to meet its obligations promptly and to reimburse the recipient of the award for the lost use of the money involved." H.R. Rep. 98-992, 98th Cong., 2d Sess. 12 (1984).

---

[14] The amendment also applies to fees awarded under 28 U.S.C. 2412(d); that subsection had expired on October 1, 1984, and was reenacted as part of the recent amendment. Pub. L. No. 99-80, § 6, 99 Stat. 186.

[15] As originally passed by Congress, the EAJA amendment made interest available from 61 days after the date of judgment through the date of payment. See H.R. Rep. 98-992, 98th Cong., 2d Sess. 12 (1984). The Comptroller General objected to this provision, however, noting that interest generally is available only after an unsuccessful appeal by the government (see 31 U.S.C. 1304(b)(1)(A)) and that the proposed amendment therefore accorded EAJA awards uniquely favorable treatment. Letter from the Comptroller General to Senator Thurmond, B-40342.4 (Oct. 5, 1984). The President subsequently vetoed the amendment, citing the Comptroller General's objections. See 20 Weekly Comp. Pres. Doc. 1814, 1815 (Nov. 8, 1984). Congress then modified the amendment to meet the objections. See H.R. Rep. 99-120, 99th Cong., 1st Sess. (1985). The decision below thus presumes that Congress —without making any explicit statement—intended to give Title VII fee awards uniquely favorable treatment of the sort that Congress deliberately avoided in the 1985 EAJA amendment.

This recent congressional recognition that interest is unavailable on attorneys' fee awards in the absence of an express provision to the contrary—and that statutes providing for interest generally should do so only in narrow, established circumstances—plainly makes the court of appeals' ruling untenable. Indeed, if the court of appeals' analysis of the parallel language in Section 2000e-(5)(k) were correct, the 1985 EAJA amendment not only would have been unnecessary, but also would have flown in the face of the congressional intent by *narrowing* the circumstances in which interest may be awarded under the statute.[16]

3. By thus disregarding the sharp contrast between Section 2000e-5(k) and the other statutes in which Congress has permitted interest to run on substantive recoveries against the United States, the court of appeals frustrated the purpose long served by the "no-interest rule"—the "protection of the public" (4 Op. Atty. Gen. 136, 137 (1842)) from unexpected liabilities arising at unanticipated times. That effect is particularly noticeable where, as here, an award of prejudgment interest is concerned, for such liability may be found to have attached years after the fact for reasons that were wholly beyond the government's control. In this case, for example, the district court withheld judgment for one year pending the decision in *Copeland* and for a second year while the fee issue was under submission, and then ordered the government to pay interest on a fee generated three years earlier. See pages 3-4, *supra*.

---

[16] Congress made no suggestion that the pre-amendment EAJA should have been read to authorize awards of interest, and gave no indication that it was aware of *Arvin* and *East Baton Rouge*.

More basically, the court of appeals' conclusion that courts may infer waivers of immunity from ambiguous statutory language infringes in a direct way on the congressional prerogative to waive the government's sovereign immunity. For well over 100 years, as the legislation cited above demonstrates, Congress has been acting against the background of—and presumably relying upon—the "no-interest rule" that consistently has been propounded by this Court. If legislation enacted in that setting is to be interpreted in light of a new controlling principle, such a "change, in view of the long-prevailing, rigorously-applied rule, lies within the province of Congress" (Pet. App. 42a (Ginsburg, J., dissenting)).

C. 42 U.S.C. 2000e-5(k) May Not Be Read To Authorize Delay Adjustments Of Any Sort To Fee Awards

A final question concerns the appropriate disposition of this case. Dissenting below, Judge Ginsburg felt constrained by District of Columbia Circuit precedent (see Pet. App. 40a-41a) to advocate a remand. See note 4, *supra*. That precedent, she suggested, recognized a distinction between impermissible "interest" and other, permissible types of "adjustment for delay in receipt of payment" that "figure[s] as a contingency adjustment, applied prospectively to the lodestar" (Pet. App. 38a). This line of analysis is grounded on the assumption that "an attorney embarking on services for which he or she anticipates payment ultimately, but not promptly, may factor in the expected delay" in setting an hourly rate (*id.* at 38a-39a). Here, Judge Ginsburg would have returned the case to the district court for a determination whether the historic rates charged by respondent's attorney contained such a component for anticipated delay in receipt of payment; if they did not, circuit precedent would permit an adjustment to the lodestar to add such a component (through the use of the attorney's *current* rates) (*id.* at 53a-56a). See also note 3, *supra*.

As the court below itself recognized (Pet. App. 12a n.41), however, this analysis cannot be squared with the "no-interest rule." That rule is not directed solely at monetary awards expressly denominated as interest; because the doctrine is based on the proposition that delay cannot be attributed to the government (see page 12, *supra*), it uniformly has been applied to prevent plaintiffs from holding the United States liable, absent its explicit consent, for all claims grounded on "the belated receipt" of funds." *Saunders*, 629 F.2d at 598. The courts accordingly have barred claims of every kind arising out of the delayed payment of substantive recoveries by the United States, whether termed "inflation adjustments" (*Blake*, 626 F.2d at 895; *Saunders*, 629 F.2d at 598), "compensation for use" (*North American Co.*, 253 U.S. at 337-338), or something equally euphemistic. See generally *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976); *United States* v. *Delaware Tribe of Indians*, 427 F.2d 1218, 1222-1224 (Ct. Cl. 1970). See note 10, *supra*. And while there are technical differences between interest and an adjustment of the lodestar through the use of current rates,[17] the latter type of payment is expressly de-

[17] In contrast to a flat interest rate applied retrospectively, for example, current rates may more clearly take account of inflationary changes that occurred while payment was pending. Cf. *Blake*, 626 F.2d at 895 & n.9. At the same time, however, a law firm's or practitioner's rates may be affected

signed to adjust the fee award for "inflation and interest." *Ramos* v. *Lamm*, 713 F.2d 546, 555 (10th Cir. 1983). See *Murray* v. *Weinberger*, 741 F.2d 1423, 1433 (D.C. Cir. 1984); *Johnson* v. *University College of the University of Alabama*, 706 F.2d 1205, 1210-1211 (11th Cir.), cert. denied, 464 U.S. 994 (1983); *National Ass'n of Concerned Veterans* v. *Secretary of Defense*, 675 F.2d 1319, 1328 (D.C. Cir. 1982); *Copeland* v. *Marshall*, 641 F.2d 880, 893 (D.C. Cir. 1980) (en banc). Use of current rates, in other words, is nothing more than an "adjustment[] for delay in payment." *Murray*, 741 F.2d at 1433.

Furthermore, the suggestion that current rates may realistically be distinguished from interest on the ground that the former substitute for what should have been a prospectively applied delay factor (see Pet. App. 38a (Ginsburg, J., dissenting)) is based on a fiction. As the court of appeals acknowledged, "an award under a fee-shifting statute benefiting only a party prevailing in litigation can never be made prospectively" (*id.* at 12a n.41). Because the rate used in calculation of the lodestar is chosen at the completion of the litigation, allowing the addition of a delay factor (or the use of current rates) simply amounts to a decision that the attorney is entitled to obtain compensation for delay attributed to the federal government. That remedy is foreclosed by the "no-interest rule."

---

by a wide range of factors wholly unrelated to the passage of time, such as changes in the firm's reputation, experience, or expenses. Even if Congress in Section 2000e-5(k) has waived sovereign immunity as to awards of interest, then, it is far from clear that use of a current rate adjustment ever would be an appropriate substitute for interest.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

RICHARD K. WILLARD
Assistant Attorney General

KENNETH S. GELLER
Deputy Solicitor General

CHARLES A. ROTHFELD
Assistant to the Solicitor General

NOVEMBER 1985

☆ U. S. GOVERNMENT PRINTING OFFICE: 1985 491507 20054

RESPONDENT'S

BRIEF

No. 85-54

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LIBRARY OF CONGRESS, *et al.*,

Petitioners,

v.

TOMMY SHAW.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT

JULIUS LEVONNE CHAMBERS
CHARLES STEPHEN RALSTON
(Counsel of Record)
99 Hudson Street
16th Floor
New York, New York 10013
(212) 219-1900

Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether pre-judgment adjustments to compensate for delay in payment may be part of the calculation of a reasonable attorney's fee and other relief in a Title VII case brought against the federal government under 42 U.S.C. §§ 2000e-16(c) and (d).

2. Whether 42 U.S.C. § 2000e-16 constitutes a complete abrogation of sovereign immunity so that the same full relief available in a Title VII action against private and state and local government employers is also available against federal government agencies.

TABLE OF CONTENTS

Questions Presented i

Table of Authorities iv

STATUTES INVOLVED 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 10

ARGUMENT

I. THERE IS NO BAR TO A DELAY IN PAYMENT ADJUSTMENT TO AN ATTORNEYS' FEE AWARD AGAINST THE UNITED STATES . 12

A. Adjustments for Pre-Judgment Delays In Payment May Be Included In Awards Of Equitable Relief Against The Federal Government In The Absence Of Specific Statutory Authorization.. 14

B. The Inclusion of A Factor To Compensate For Pre-judgment Delays In Payment Is A Necessary Component In Calculating A Reasonable Attorney's Fee. . 24

II. SECTION 717 OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 IS A COMPLETE ABROGATION OF SOVEREIGN IMMUNITY IN EMPLOYMENT DISCRIMINATION CASES 39

A. Congressional Intent Is Determinative Of The Extent Sovereign Immunity Is Waived By A Particular Statutory Scheme. 39

B. Congress Intended To Waive All Sovereign Immunity Bars To The Award of Complete Relief In Title VII Cases. 43

Conclusion 61

APPENDICES

I. Statutes Involved

II. Calculation of Loss of Value Through Inflation

III. Memorandum of Attorney General Griffin B. Bell for United States Attorneys and Agency General Counsel (Aug. 31, 1977)

TABLE OF AUTHORITIES

Page

Cases:

Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) 37

Albrecht v. United States, 329 U.S. 599 (1947) 17

Alyeska Pipeline Service v. Wilderness Soc., 421 U.S. 240 (1975) 36

Blake v. Califano, 626 F.2d 891 (D.C. Cir. 1980) 8

Blum v. Stenson, ___ U.S. ___, 79 L.Ed.2d 891 (1984) 25, 32

Boston Sand Co. v. United States, 278 U.S. 41 (1928) 40

Brooks-Scanlon Corp. v. United States, 265 U.S. 106 (1924) . 17

Brown v. General Services Administration, 425 U.S. 820 (1976) 46, 50, 51

Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971) . . 49

Chandler v. Roudebush, 425 U.S. 840 (1976) 44, 46

Chisholm v. United States Postal Service, 665 F.2d 482 (4th Cir. 1981) 33

Copeland v. Marshall, 641 F.2d 880 (1980) 3,4,6,7,24

Franchise Tax Board of California v. United States Postal Service, ___ U.S. ___, 81 L.Ed. 2d 446 (1984) 39

Franks v. Bowman Transportation Company, 424 U.S. 747 (1976) 54

Gautreaux v. Chicago Housing Authority, 690 F.2d 601 (7th Cir. 1982) 24

General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983). 15, 16, 17, 34, 35, 36, 37

Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969) 50

Graves v. Barnes, 700 F.2d 220 (5th Cir. 1983) 24

Griffin v. Carlin, 755 F.2d 1516 (11th Cir. 1985) 33

Hensley v. Eckerhart, 461 U.S. 424 (1983) 25

Holly v. Chasen, 639 F.2d 795 (D.C. Cir. 1981), cert. denied, 454 U.S. 822 (1981) 8

Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3rd Cir. 1985) 24

James v. Stockham Valves & Fitting Co., 559 F.2d 310 (5th Cir. 1977) 34

Johnson v. University College of the University of Alabama, 706 F.2d 1205 (11th Cir. 1983) 6, 24

Jorstad v. IDS Realty Trust, 643 F.2d 1305 (8th Cir. 1981) . 24

Laycock v. Parker, 103 Wis. 161, 79 N.W. 327 (1899) 20

Liggett & M. Tobacco v. United States, 274 U.S. 215 (1927) 17

Nagy v. United States Postal Service, 773 F.2d 1190 (11th Cir. 1985) 40

Nedd v. United Mine Workers of America, 488 F. Supp. 1208 (M.D. Pa. 1980) 19, 20

Newman v. Piggie Park Enterprises, 390 U.S. 490 (1968) 26, 38

Parker v. Califano, 561 F.2d 320 (D.C. Cir. 1977) 26

Parker v. Lewis, 670 F.2d 249 (D.C. Cir. 1982) 5

Phelps v. United States, 274 U.S. 341 (1927) 17

Ramos v. Lamm, 713 F.2d 546 (10th Cir. 1983) 24

Saunders v. Claytor, 629 F.2d 596 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981) 9, 33

Seabord Air Line R. Co. v. United States, 261 U.S. 299 (1923) 17, 18

Shultz v. Palmer, (No. 85-50) 33

Smith v. Califano, 446 F. Supp. 530 (D.D.C. 1978) 53

Smith v. Phillips, 455 U.S. 209 (1982) 10

Standard Oil Co. v. United States, 267 U.S. 76 (1925) 41

Teamsters v. United States, 431 U.S. 324 (1977) 36

United States v. New York Telephone Co., 434 U.S. 159 (1977) 10

United States v. North American Transportation and Trading Co., 253 U.S. 330 (1920) 18

United States v. Sherman, 98 U.S. 565 (1878) 21, 22

United States v. Testan, 424 U.S. 392 (1976) 49

Waite v. United States, 282 U.S. 508 (1931) 16, 17, 36

Statutes, orders, and regulations:

Equal Access to Justice Act 56

5 U.S.C. § 5596(b) 49

5 U.S.C. § 7701(g)(2) 53

28 U.S.C. § 2516 . . . . 1, 10, 14, 23

42 U.S.C. § 2000e-5(g) 54, 55

42 U.S.C. § 2000e-5(k) 44, 57

42 U.S.C. § 2000e-16 . . . . . passim

P.L. 88-352, § 701(b) 48

P.L. 96-481, § 206 56

42 Stat. 1590, ch. 192 (5-15-22) . 40

Executive Order 11246 48

Executive Order 11478 48

President's Reorganization Plan No. 1 of 1978, 43 F.R. 28 71 (1978) 52

5 C.F.R. Part 713 (1967) 48

5 C.F.R. § 1201.37 53

29 C.F.R. Part 1613 48

29 C.F.R. § 1613.271(c) 53

Other Authorities:

"Counsel Fees in Public Interest Litigation", Report By the Committee on Legal Assistance, 39 The Record of the Association of the Bar of the City of New York 300 (1984) 25, 29

The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcommittee on Representation of Citizen Interests of the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess. (1973) . . 27

Hearings Before the General Subcommittee on Labor of the House Committee on Education And Labor on H.R. 1746, March 3, 4, and 18, 1971 . . . . . 48, 51

Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, on S. 2515, S.2617, and H.R. 1746, Oct. 4, 6, and 7, 1971 . . . . . 50, 51

Hohenstein, "Subtract Inflation from Your Income, Prices and Profits," Legal Economics 35 (ABA Section on Economics of Law Practice, Summer 1978) 1b

H. Rep. No. 92-238 (92d Cong. 1st Sess., 1971) 43

H. Rep. No. 94-1558 (94th Cong. 2d Sess. 1976) 27, 28, 34

Letter from Irving Jaffe, Acting Assistant Attorney General, to Senator John V. Tunney, May 6, 1975, 2 CCH Employment Practices Guide ¶ 5327 (1976) 57

Memorandum of Attorney General Griffin B. Bell for United States Attorneys and Agency General Counsel (Aug. 31, 1977), 2 CCH Employment Practices Guide ¶ 5046 (1977), ... 59, 60

Note, "Interest in Judgments Against the Federal Government: The Need for Full Compensation," 91 Yale L.J. 297 (1981) 20

1 Op. Atty. Gen. 268 (1819) 21

2 Op. Atty. Gen. 390 (1830) 22

5 Op. Atty. Gen. 138 (1849) 22

5 Op. Atty. Gen. 227 (1850) 22

Ralston, "The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws," 10 Ga. L. Rev. 717 (1976) 57

S. Rep. No. 92-415 (92d Cong. 1st Sess., 1971) 34, 43, 45

S. Rep. No. 94-1011 (94th Cong. 2d Sess. 1976) 27

Schlei & Grossman, Employment Discrimination Law, (2d Ed. 1983) 36, 47

Subcommittee on Labor, Senate Committee on Labor and Public Welfare, "Legislative History of the Equal Employment Opportunity Act of 1972" . . . 45, 51, 52, 53, 55

United States Dept. of Labor, Bureau of Labor Statistics, Monthly Labor Review, May, 1985 . . . 2b

No. 85-54

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

LIBRARY OF CONGRESS, et al.,

Petitioners

v.

TOMMY SHAW

On Writ of Certiorari to The
United States Court of Appeals
for the District of Columbia Circuit

BRIEF FOR RESPONDENT

STATUTES INVOLVED

In addition to those in petitioners' brief, this case involves the following statutes, the text of which are set out in the appendix to this Brief:

42 U.S.C. § 2000e-16(a)-(c)

28 U.S.C. § 2516(a).

STATEMENT OF THE CASE

In general, petitioners' description of the proceedings below is accurate. Respondent does wish to emphasize a number of points regarding the context in which issue now before the Court arose.

This action began with the filing of an administrative complaint charging discrimination in employment against respondent Tommy Shaw, an employee of the Library of Congress. After respondent retained counsel, a settlement of his claim was negotiated. However, the agency, on advice from the Comptroller General, took the position that it could not agree to an award of back pay. This ruling, which the district court noted was caused by the Library's failure to make it clear that the claim arose under Title VII, necessitated the filing of the

present action. Order and Judgment of the District Court, Sept. 14, 1979; Pet. App. p. 59a-60a. The government continued to argue that an award of back pay was not possible when a federal employee's claim of discrimination was settled administratively, but the district court ruled for the respondent and against the government on cross-motions for summary judgment. As a result of these proceedings, respondent received a promotion and an appropriate amount of back pay.

As petitioners note, at issue in this case now are the fees remaining to be paid to one of the respondent's attorneys for work done as far back as 1978. The fee award was not made by the district court until 1980 since it decided to await the en banc decision of the Court of Appeals of the District of Columbia in Copeland v. Marshall, 641 F.2d 880 (1980), which

established definitive standards for awards of fees in Title VII cases in the District, particularly in cases involving the federal government. The government made no objection to delaying the fee disposition until Copeland was announced.[1]

As the district court noted when it made its award, the government neither disputed respondent's entitlement to fees nor much of the amount to be awarded.[2]

[1] The district court entered its judgment on the merits on September 14, 1979. In that order it announced its intention to await the en banc decision in Copeland. See, Order and Judgment of the District Court, filed September 14, 1979. Copeland was announced in September, 1980.

[2] The government argued that a proper hourly rate would be $60. It was not precise, however, with regard to the number of hours for which fees should be awarded, but only suggested that the 103.75 hours claimed should be reduced "significantly." See, Defendant's Memorandum of Points and Authorities In Opposition to Shalon Ralph's Motion for Attorney's Fees, pp. 3-5; 7-8. The district court subtracted only 4.75 hours, for time spent on an issue on which respondent did not prevail, and awarded fees for a total of 99 hours. Pet. App. pp. 63a-64a. The government did not dispute this result on appeal.

Nevertheless, in keeping with its long-standing practice, the government did not offer to pay that part of the fee that was undisputed. (Pet. App. p. 68a.) Indeed, payment of the undisputed amount was not made until the present appeal was pending and, then, it was a consequence of a decision of the court of appeals in another case, Parker v. Lewis, 670 F.2d 249 (D.C. Cir. 1982), requiring payment of the undisputed portions of a fee award pending appeal.[3] The Parker rule was premised on the need to avoid delays in payment and consequent hardships to Title VII plaintiffs and their attorneys.

[3] The court of appeals did, as recited in its opinion (Pet. App. p. 6a, n. 24), order payment of $6,779.50, the undisputed amount. However, the parties had previously entered into a stipulation for such payment in the district court based on Parker v. Lewis, supra. See, Stipulation to The Entry of An Order to Enforce In Part the Judgment Awarding Counsel Fees and Costs.

Copeland squarely held that in actions against the federal government delay in payment must be factored in when calculating a reasonable fee. 641 F.2d at 893. Thus, the district court followed Copeland and used one of the methods set out in that decision to arrive at an appropriate amount for the delay.[4] As petitioners note in their brief, the correctness of the district court's calculation is still in dispute, since the court of appeals remanded for clarification whether the hourly rate awarded already included compensation for delay.

[4] Three methods to compensate for delay are: (1) the use of hourly rates current at the time the award is made; (2) adjusting the rates by year by an appropriate amount so as to adjust for inflation; (3) adjusting the lodestar amount by an appropriate factor. See Johnson v. University College of the University of Alabama, 706 F.2d 1205, 1210-11 (11th Cir. 1983). The district court used the third method.

In addition to the en banc decision in Copeland, panels of the court of appeals had held that fees in Title VII actions against federal agencies fees should be adjusted for delay in payment. Thus, when the present case arrived in the court of appeals, there was already an en banc decision and at least three panel decisions of that court that squarely held that the district court was correct in including a delay factor. Counsel for respondent in the court of appeals (who are also counsel here) not surprisingly relied on the clear law of the circuit to support the judgment of the district court.[5] Since there was no need to go beyond the settled law of the circuit, they did not argue at length the issues of

[5] The court below noted "the seemingly clear applicability of these precedents" but decided not to rest "on stare decisis alone." Pet. App. p. 9a.

waiver of sovereign immunity and other matters presented now. Thus, the argument made was essentially that the calculation of a reasonable attorney's fee necessarily included compensation for delay in payment, an argument accepted even by the dissenting judge below.

Moreover, panel decisions of the court of appeals had also held that cost of living adjustments were not available on backpay awards against the government [6] and that interest qua interest could not be assessed on a fee award.[7] Again, since the state of the law in the circuit established the correctness of the district court's decision, counsel for

---

[6] Blake v. Califano, 626 F.2d 891 (D.C. Cir. 1980).

[7] Holly v. Chasen, 639 F.2d 795 (D.C. Cir. 1981), cert. denied, 454 U.S. 822 (1981).

respondent (appellee there) did not feel it either necessary or desirable to raise these other issues.[8]

If the government's suggestion to the court of appeals for rehearing en banc in the present case had been granted, respondent would, of course, have raised and relied upon all of the arguments made herein to support the judgment of the district court. Thus, the government's attempt (Pet. Brief, p. 18) to make something out of counsel's decision not to raise these questions before a panel of the court below when such issues were decided by its earlier decisions is

---

[8] As we have already noted in our Brief in Opposition to the Petition for Writ of Certiorari, we believe that the decisions of lower courts holding that back pay awards cannot be adjusted for inflation in cases against the federal government are incorrect. See infra at pp.35-38. Indeed, that precise issue was presented to this Court in Saunders v. Claytor, 629 F.2d 596 (9th Cir. 1980), cert. denied, 450 U.S. 980 (1981), but this Court has not resolved the issue to date.

without substance. Of course, respondent may rely here on any ground in support of the judgment below. United States v. New York Telephone Co., 434 U.S. 159, 166, n. 8 (1977); Smith v. Phillips, 455 U.S. 209, 215, n. 6 (1982).

SUMMARY OF ARGUMENT

I.

A. There is no sovereign immunity or statutory bar to awards of pre-judgment interest, or its equivalent, against the United States where it is necessary to provide complete equitable relief. The cases the government relies on, as well as 28 U.S.C. § 2516, involve post-judgment interest, the purpose of which is entirely different. Decisions of this Court make the distinction clear and hold that pre-judgment interest may be made in the absence of specific statutory authority.

B. In calculating a reasonable attorneys' fee, factoring in amounts to compensate for delays in payment is essential. Without such an adjustment, a prevailing plaintiff's attorney will in fact be awarded less than a market rate. The result will be that attorneys will be discouraged from representing federal employees who have Title VII claims. Therefore, pre-judgment interest or its equivalent is appropriate in awards of fees against the United States.

II.

A. The extent of a waiver of sovereign immunity is a matter of Congressional intent. Whether interest on awards against the government is permissible must be determined from the purpose of the particular statutory scheme.

B. Both the language of 42 U.S.C. § 2000e-16 and its legislative history make it clear that Congress intended to remove all sovereign immunity bars to the granting of full relief to federal employees who have equal employment claims. The statute itself explicitly provides that attorneys' fees are to be awarded on the same basis as against "a private person."

ARGUMENT

I.

THERE IS NO BAR TO A DELAY IN PAYMENT ADJUSTMENT TO AN ATTORNEYS' FEE AWARD AGAINST THE UNITED STATES

This case, in the government's view, involves no more than whether the word "interest" can be found somewhere in the provisions of Title VII that apply to the United States. We will demonstrate that:

1. A long line of decisions of this Court establishes that, even in the absence of specific statutory authorization, pre-judgment adjustments that compensate for delay in payment and/or deprivation of the use of funds -- whether denominated "pre-judgment interest" or otherwise -- are available against the government to provide full compensation as part of equitable relief.

2. The inclusion of a delay in payment factor, as in this case, is a necessary component of a reasonable attorney's fee. Since the adjustment is necessary to provide full compensation, it is available here as a matter of legislative intent, consistent with the Court's precedents.

3. Alternatively, there is no sovereign immunity bar to an award of interest against the government in a Title

VII action because 42 U.S.C. §2000e-16 is a complete abrogation of sovereign immunity. Congress' clear intent was to ensure that employees of the United States will enjoy the same scope of protection from employment discrimination as do all other employees. Therefore, Title VII is a statute that authorizes interest as part of complete relief.

A. Adjustments For Pre-judgment Delays In Payment May Be Included In Awards Of Equitable Relief Against The Federal Government In The Absence of Specific Statutory Authority.

The petitioners argue that decisions of this Court, as codified in 28 U.S.C. § 2516, stand as an absolute bar to any inclusion of a delay in payment factor in calculating the value of a fee award because the word "interest" does not appear in Title VII. However, a close examination of the cases cited by the

government demonstrates that they do not support this proposition. Rather, precisely the opposite is true; the government has been led into a fatal error by its failure to distinguish between the nature and purpose of pre-judgment interest, which is involved here, and post-judgment interest, which is not.

In General Motors Corp. v. Devex Corp., 461 U.S. 648 (1983), the Court explained that, in a patent infringement case, an award of prejudgment interest from the time that the royalty payments would have been received to the time of the judgment, "merely serves to make the patent owner whole, since his damages consist not only of the value of the royalty payments but also of the forgone use of the money between the time of infringement and the date of the judg-

ment." Therefore, prejudgment interest should ordinarily be awarded. 461 U.S. at 655-56.

The Court went on:

> This very principle was the basis of the decision in Waite v. United States, 282 U.S. 508 (1931), which involved a patent infringement suit against the United States. The patent owner had been awarded unliquidated damages in the form of lost profits, but had been denied an award of prejudgment interest. This Court held that an award of prejudgment interest to the patent owner was necessary to ensure "complete justice as between the plaintiff and the United States," id., at 509, even though the statute governing such suits did not expressly provide for interest.

461 U.S. at 656 (emphasis added). In Waite itself, Justice Holmes noted that the statute at issue granted "'recovery of [the plaintiff's] reasonable and entire compensation for such use.' We are of

opinion that interest should be allowed in order to make the compensation 'entire'". 282 U.S. at 509.[9]

Waite cites and relies upon a series of decisions in eminent domain actions holding that the Fifth Amendment's "just compensation" clause includes compensation for delay between the time of the determination of market value of the property and when the award is made. Seaboard Air Line R. Co. v. United States, 261 U.S. 299 (1923); Brooks-Scanlon Corp. v. United States, 265 U.S. 106, 126 (1924); Liggett & M. Tobacco Co. v. United States, 274 U.S. 215 (1927); Phelps v. United States, 274 U.S. 341 (1927). See also Albrecht v. United States, 329 U.S. 599 (1947), and cases cited id.at 602, n. 4. As explained in General Motors Co. v. Devex, supra,

---

[9] Interestingly, in Waite the government conceded that pre-judgment interest was proper.

without such an adjustment the patent or property owner will not in fact be fully compensated for the value of his property and the loss of its use. Thus, "no specific command to include interest is necessary when interest or its equivalent is a part of [just] compensation." Seaboard Air Line R. Co. v. United States, 261 U.S. at 306.[10]

The situation here is precisely analogous. The government contends that reimbursement for attorneys' fees is limited to the dollar amount that was the market value of the services at the time

[10] In contrast, the rule is that interest is not available in the absence of specific statutory provision when land is taken through purchase or a contract rather than by an adverse condemnation proceeding. See, e.g., United States v. North American Transportation & Trading Co., 253 U.S. 330 (1920). In the former case the interest is on the established amount agreed upon as proper compensation, and therefore has the character of post-judgment interest. In the latter case, the interest is pre-judgment and is therefore part of the calculation of just compensation.

they were rendered. As we will demonstrate at length below, however, full compensation can only be made through an adjustment of that dollar amount to reflect loss of value because of the passage of time.

The inclusion of pre-judgment interest as part of the award of full relief is well established in federal law. See Nedd v. United Mine Workers of America, 488 F. Supp. 1208, 1216-25 (M.D. Pa. 1980) for a scholarly and comprehensive survey of the cases. An award is left to the court's sound discretion based on the weighing of four factors: (1) responsibility for delays in prosecuting an action; (2) undoing unjust enrichment; (3) compensation of the victim of a legal wrong; and (4) other equitable considerations. Id. at 1220-24. The key to pre-judgment interest is that it is a part of the calculation of the judgment itself,

and is included when it is necessary to provide "reasonable", "entire", or "just" compensation.[11]

Post-judgment interest, on the other hand, rests on an entirely different basis. The traditional rationale for assessing post-judgment interest was to punish a debtor for failing to repay a loan or another certain obligation the amount of which had become fixed, such as a judgment of a court. Laycock v. Parker, 103 Wis. 161, 179, 79 N.W. 327, 332 (1899). See, Note, "Interest in Judgments Against the Federal Government: The Need for Full Compensation," 91 Yale L.J. 297,

[11] As Nedd points out, the common law distinction between liquidated and unliquidated damages does not determine, under federal law, whether pre-judgment interest is available. 488 F. Supp. at 1217. The government's suggestion to the contrary (Pet. Brief, p. 23, n. 13) is both incorrect and inconsistent with its position that fee and back pay awards against private employers may be adjusted for delay in payment.

300-1 (1981). The no-interest rule developed when interest was thus viewed as a penalty. Sovereign immunity barred an award of interest since the government had to give its specific consent to being penalized. As this Court explained:

> Whenever interest is allowed either by statute or by common law, except in cases where there has been a contract to pay interest, it is allowed for delay or default of the debtor. But delay or default cannot be attributed to the government. It is presumed to be always ready to pay what it owes.

United States v. Sherman, 98 U.S. 565, 567-8 (1878).

Thus, the 1819 Attorney General's opinion from which the no-interest rule derives involved interest on a claim in a pre-determined amount. The opinion notes, "Interest is in the nature of damages for withholding money which the party ought to pay, and would not or could not." 1 Op.

Atty. Gen. 268 (1819). Indeed, even the opinions of the attorney general upon which the government relies recognize that in some instances interest is recoverable where it is necessary for full compensation, e.g., where a "claimant shall have paid interest; in which case, indeed, interest becomes strictly a portion of the principal of his claim." 2 Op. Atty. Gen. 390, 392 (1830). See also, 5 Op. Atty. Gen. 138 (1849); 5 Op. Atty. Gen. 226 (1850). United States v. Sherman also recognizes the distinction, noting, "the interest is no part of of the amount recovered. It accrues only after the recovery has been had." 98 U.S. at 567.

Similarly, virtually all of the cases cited by the petitioners at pages 13-15 of their brief involved the award of ordinary post-judgment interest. They simply apply the rule that a penalty for failure

to pay an established debt could not be imposed on the government without its consent. And, as the government concedes here, 28 U.S.C. § 2516(a) and its predecessors, barring interest on "claims against the United States" in the absence of contract or specific statutory authorization, did no more than codify the rule established by the attorney generals' opinions and the post-judgment interest cases.

Thus, it can be seen that the government has failed to recognize the distinction between ordinary interest of the post-judgment kind contemplated by 28 U.S.C. § 2516, which serves as a penalty or as income for the use of money following a delay in the satisfaction of a judgment, and prejudgment interest (or other similar factors) which represents part of the calculation of full relief in

the first instance. The cases upon which the government relies involve the former type of interest. This case involves the latter.

B. The Inclusion Of A Factor To Compensate For Pre-judgment Delays In Payment Is A Necessary Component In Calculating A Reasonable Attorney's Fee.

Section 2000e-5(k) provides that the court, in its discretion, shall award a reasonable attorney's fee. The lower courts have held, so far without exception, that in civil rights cases compensation for delay in payment must be included in a reasonable fee.[12] The

[12] See, e.g., Copeland v. Marshall, 641 F. 2d at 892-93; Institutionalized Juveniles v. Secretary of Public Welfare, 758 F.2d 897 (3rd Cir. 1985); Graves v. Barnes, 700 F.2d 220, 224 (5th Cir. 1983); Gautreaux v. Chicago Housing Authority, 690 F.2d 601, 612 (7th Cir. 1982); Jorstad v. IDS Realty Trust, 643 F.2d 1305, 1313 (8th Cir. 1981); Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983); Johnson v. University College of the University of Alabama, 706 F.2d 1205, 1210-11 (11th Cir. 1983).

government has not directly challenged the correctness of those decisions insofar as fees are to be calculated against every other employer except itself. Nevertheless, it is essential to understand why such an adjustment is a prerequisite to a reasonable fee in order to demonstrate the fallacy of the government's mechanical equation of all pre-judgment adjustments with post-judgment interest.

The legislative purpose of the various civil rights attorneys' fees act statutes have been explored at length by this Court in recent decisions and need not be repeated in detail here.[13] Suffice it to say that a key concern of Congress was

See also "Counsel Fees in Public Interest Litigation," Report By the Committee on Legal Assistance, 39 The Record of the Association of the Bar of the City of New York 300, 318 (1984).

[13] Hensley v. Eckerhart, 461 U.S. 424 (1983); Blum v. Stenson, ___ U.S. ___, 79 L.Ed.2d 891 (1984).

that if the fees that were available were insufficient to attract the private bar, there would not be an adequate level of private enforcement of Title VII and the other civil rights acts. As this Court noted in its seminal decision in Newman v. Piggie Park Enterprises, 390 U.S. 490 (1968) the resources of the federal government itself were simply insufficient for the level of enforcement necessary to end the problem of racial discrimination in our society. Thus, the statute provided fees to ensure that "private attorneys general" would furnish the essential level of private enforcement.

The problem is even more acute when the government is a defendant in a Title VII case for, as has been noted in another context, there is no public attorney general to bring actions on discrimination claims of federal employees. Parker

v. Califano, 561 F.2d 320, 331 (D.C. Cir. 1977). Only private parties may bring such actions and, therefore, without the full involvement of the private bar the statute will not be enforced.

In the legislative history of the Civil Rights Attorneys Fee Act of 1976 Congress expressed these concerns at length. Thus, there is a consistent theme that unless fees are sufficiently attractive to attact the private bar there will be insufficient enforcement.[14]

The legislative history of the Fees Act is replete with comparisons between the situations of plaintiff's attorneys and defendant's attorneys in civil rights cases.[15] Ordinarily a defendant, particu-

---

[14] See S. Rep. No. 94-1011 (94th Cong. 2d Sess., 1976), 2-5; H. Rep. No. 94-1558 (94th Cong. 2d Sess., 1976), 2-3).

[15] H. Rep. No. 94-1558, supra at 7; The Effect of Legal Fees on the Adequacy of Representation, Hearings Before the Subcommittee on Representation of Citizen

larly when it is a public agency, has available far greater resources than the ordinary civil right litigant.[16] Indeed, this case is paradigmatic: a single middle-class federal employee faced with the full array of the legal and technical resources of the Library of Congress and the Department of Justice.

Such plaintiffs typically cannot pay attorney's fees at all or, as here, only a limited amount. Thus, the attorney must look to the possible award of fees in the future for compensation. If the eventual award is not sufficiently equivalent to fees the attorney could have obtained through other types of practice at the time the services are rendered, there will be a "negative incentive to move away from

---

Interests of the Committee on the Judiciary, United States Senate, 93rd Cong., 1st Sess. at 84; 834-36 (1973).

16 H. Rep. No. 94-1558, supra at 7.

civil rights litigation and to concentrate efforts on more profitable aspects of the practice."[17]

The disincentives are particularly strong for the typical civil rights lawyer, who tends to be a single practitioner or in a small firm. Given the realities of paying off the massive loans incurred to obtain a law degree and to set up practice, paying rent, staff salaries, and having enough left over to live on, taking on a complex civil rights case must be economically feasible for such a lawyer.

To give an example, assume an attorney in 1975 with the choice of accepting: (1) a fee-paying client whom he could bill at his or her established market rate of $80 per hour, monthly; or

---

17 Counsel Fees In Public Interest Litigation, op. cit. supra, n. 12, at 318, 325-26.

(2) a civil rights client for whose case he or she would receive no fees until a court award five years later in 1980. If, in 1980, the lawyer received only the same $80 per hour, he or she would have to be extraordinarily altruistic to take on client number two, wait five years, and receive an $80 per hour devalued by inflation and the loss of the use of that money. There must be some basis to encourage him or her to take the second client over the first or Congress' intent will be thwarted entirely.

In order for the lawyer to be paid at a rate equivalent to the $80 market rate in 1975 he or she must be able to receive $122.40 per hour in 1980.[18] This larger amount will do no more than compensate the lawyer at the same effec-

[18] A simple calculation based on the Consumer Price Index is set out in detail in appendix II to this Brief at pp. 2b-3b.

tive rate as he or she would have received in 1975 dollars. Even that would not cover the full value of the money, for the lawyer (or fee-paying client) has lost the value of the use of that money in the interim, and has suffered attendant cash flow problems.[19] Accordingly, the 10% adjustment per year ordered by the district court on the basis of the rate available on Treasury bonds, is the least that counsel was entitled to.[20]

[19] For example, consider what counsel would have had to spend to borrow sufficient money to pay his or her 1975 bills in reliance on a fee to be awarded in 1980. With commercial interest rates in the 8 to 15% range, eighty 1975 dollars would have cost about $155 by 1980.

[20] Of course, the court should have compounded the interest rather than simply multiplying it by the number of years passed. The court's mathematical error, however, only results in a difference of about $2.50 per hour in the government's favor.

Put in another way, paying the attorney $80 per hour in 1980 would be the same as if he or she had been paid $52 in 1975.[21] Since the lesser amount is substantially below the established market rate, it can not, a fortiori, be a reasonable fee under this Court's decision in Blum v. Stenson, ___ U.S. ___, 79 L.Ed.2d 891 (1984).

Unfortunately, it is not unusual in civil rights cases, particularly in Title VII cases involving the federal government, for the entire process from the beginning of the administrative process through final decision in court on the merits, to take many years.[22] Many of

---

[21] See Appendix II to this Brief at p. 3b.

[22] For example, present counsel are involved in one case against the Postal Service begun by the filing by an administrative complaint in 1971 and which was filed in court in 1972. The case did not go to trial until 1982, and a decision adverse to plaintiffs was reversed by the court of appeals in 1985. The case is now back in the trial court for further proceedings. If plaintiffs were to win on the merits in 1986 there would be potential entitlement to attorneys' fees going back as far as 1972. See, Griffin v. Carlin 755 F.2d 1516 (11th Cir. 1985). Griffin is not unusual. See, Chisholm v. United States Postal Service, 665 F.2d 482 (4th Cir. 1981) (nine years from administrative complaint to final disposition of merits); Saunders v. Claytor, 629 F. 2d 596 (9th Cir. 1980) (six years between illegal discharge and award of back pay and attorneys' fees); Shultz v. Palmer (No. 85-50) (eight years between initial charge and award of fees on that portion of the case that was settled).

these cases began in the mid-1970's and the impact of the high rate of inflation in the latter part of that period was severe.

Congress was aware of the problem of delay in payment when it enacted the 1976 Fees Act. Thus, it contemplated interim fees in appropriate cases because civil rights litigation was often protracted.[23]

[23] H. Rep. No. 94-1558, supra at 8. The legislative history of the Equal Employment Opportunity Act of 1972 also reflects Congress' awareness of the limited resources of Title VII plaintiffs and the problem of time delays attendant to such

As one court has noted, the risk of financial drain will discourage the bringing of Title VII suits and defendants "may be tempted to seek victory through an economic war of attrition against the plaintiffs." James v. Stockham Valves & Fitting Co., 559 F.2d 310, 358-59 (5th Cir. 1977).

Thus, the reasons discussed supra at pp. 15-20 that make pre-judgment interest ordinarily available in patent cases apply with full force to awards of attorneys' fees, since the impact of delay is the same. Full compensation cannot be achieved unless the value of the "forgone use of the money" between the time fees are incurred "and the date of the judgment" (General Motors Corp. v. Devex, 461

litigation. Sen. Rep. No. 92-415 (92d Cong. 1st Sess., 1971) p. 17.

U.S. at 656) is taken into account.[24] Just as in a patent infringement case, denying pre-judgment interest to a prevailing Title VII plaintiff "not only undercompensates [the employee] but also may grant a windfall to the [discriminator] and create an incentive to prolong litigation." 461 U.S. at 655 n. 10.

For similar reasons, the Court should reject the government's contention that a rule that fees may be adjusted for delay in payment would be incongruous because it is "settled law," that backpay awards cannot be so adjusted. (Pet. Brief, pp. 20-21). There are three things wrong with this argument. First, if anything is

[24] This is the case whether the client has paid the attorney as the case progressed, or whether the fee was delayed in whole or in part until the action was successfully concluded. In the former instance, the plaintiff will not be made whole unless compensated for delay; in the latter, the attorney will not otherwise receive a reasonable fee.

"settled" it is that nothing is "settled law" until this Court has spoken on the question.[25] This Court has never determined whether the lower courts have been correct in holding that back pay awards against the federal government cannot be adjusted for delay in payment. See, Schlei and Grossman, Employment Discrimination Law, 1214 n. 175 (2d Ed. 1983).

Second, it is clear that the principles enunciated in General Motors Corp. v. Devex,(GMC) supra, and Waite v. United States, supra, apply fully to back pay awards. As GMC makes clear, "the standard governing the award of prejudgment interest . . . should be consistent with Congress' overriding purpose of af-

[25] See, e.g., Alyeska Pipeline Service v. Wilderness Soc., 421 U.S. 240, 270, n. 46 (1975) (overruling thirteen lower court decisions on attorneys' fees) and Teamsters v. United States, 431 U.S. 324, 378 n. 2 (1977) (overruling more than thirty decisions by six courts of appeals).

fording . . . complete compensation." 461 U.S. at 655. That purpose is to place the patent owner "in as good a position as he would have been in" if there had not been a violation. Ibid. This purpose is, of course, precisely the same purpose Congress had when it provided for equitable make-whole relief in the form of back pay in Title VII cases. Compare GMC v. Devex, 461 U.S. at 655-656 (prejudgment interest necessary to "make the patent owner whole" and to ensure "complete justice between the plaintiff and the United States") with Albemarle Paper Co. v. Moody, 422 U.S. 405, 418 (1975) (back pay an equitable remedy necessary to "make persons whole for injuries suffered on account of unlawful employment discrimination" and "to secure complete justice").

Third, as we will now demonstrate, Congress intended by § 2000e-16 to abrogate sovereign immunity in its entirety in Title VII actions against the government. Therefore, federal employees are entitled the same full relief with regard to both attorneys' fees and back pay as are all other employees.[26]

---

26 The government's asserted dichotomy between back pay as benefiting the discriminated against employee and attorneys' fees as benefiting the lawyer is also simply wrong. The provision that fees are to be paid by the defendant is for the benefit of the prevailing civil rights plaintiff just as much as is the provision of back pay. Congress and this Court recognize that without the possibility of fee-shifting, attorneys would not be available; without attorneys there will be no civil rights plaintiffs to recover back pay. See Newman v. Piggie Park Enterprises, Inc., supra. For those clients who can pay fees, their recovery is as much make whole relief as is the recovery of back pay.

II.

SECTION 717 OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 IS A COMPLETE ABROGATION OF SOVEREIGN IMMUNITY IN EMPLOYMENT DISCRIMINATION CASES.

A. Congressional Intent Is Determinative Of The Extent Sovereign Immunity Is Waived By A Particular Statutory Scheme.

The government relies mechanically on cases decided at a time when sovereign immunity was viewed as an absolute and impenetrable bar to actions brought against the federal government. More recent decisions of this Court, on the other hand, establish that sovereign immunity is a disfavored doctrine and that congressional waivers of it will be construed liberally. Thus, in Franchise Tax Board of California v. United States Postal Service, ___ U.S. ___, 81 L.Ed.2d 446 (1984) this Court reaffirmed a line of cases that have interpreted liberally "sue and be sued" language as constituting the

total abrogation of sovereign immunity. 81 L.Ed.2d at 451. The lower courts have correctly held that such language encompasses an abrogation of the bar to an award of interest in a Title VII case. See, Nagy v. United States Postal Service, 773 F.2d 1190 (11th Cir. 1985).

To what extent the sovereign immunity of the federal government has been waived by a particular statutory scheme depends, of course, on the intent of Congress. Indeed, this proposition is firmly established by the very cases relied upon by petitioners. Thus, for example, in Boston Sand Co. v. United States, 278 U.S. 41 (1928), the Court did not simply rest on the absence of the word "interest" from the private act in question.[27] Rather, the decision by Justice Holmes carefully scrutinized the context of the statute. It

[27] 42 Stat. 1590, ch. 192 (5-15-22).

concluded that Congress did not intend to "put the United States on the footing of a private person in all respects." Id. at 47.

In Standard Oil Co. v. United States, 267 U.S. 76 (1925), in contrast, the Court did find the United States liable for interest under a statute that again was silent on the subject. There, the United States acted as if it were a private insurer; therefore, it had without more consented to be treated as a private insurer. Id. at 79. As a result, interest could be obtained even though it was not expressly provided for by statute. Thus, the rule established by the decisions of this Court is that the presence or absence of a particular phrase or word is not dispositive. Rather, one must look

to the intent of Congress as evidenced by both the language and purpose of the particular statutory scheme involved.

As we have explained in our Brief in Opposition to the Petition for Writ of Certiorari at pages 17-23, the decisions embodying the no-interest rule dealt with narrow and specific Acts, leases, and contracts in regard to which the United States was acting in its sovereign and governmental capacity. By 42 U.S.C. § 2000e-16 (§ 717 of the Equal Employment Opportunity Act of 1972), in contrast, Congress had the specific and clear intent that governmental agencies, in their capacities as providers of employment opportunities, would have the same status as all other employers, private, state and local, covered under the broad and comprehensive provisions of Title VII.

Indeed, Congress intended that the federal government serve as a model for all other employers because:

> The Federal service is an area where equal employment opportunity is of paramount significance . . . . Accordingly there can exist no justification for anything but a vigorous effort to accord Federal employees the same rights and impartial treatment which the law seeks to afford employees in the private sector.

House Report No. 92-238 (92d Cong. 1st Sess., 1971), pp. 22-23; see also Sen. Report No. 92-415 (92d Cong. 1st. Sess. 1971) pp. 12-13.

B. Congress Intended To Waive All Sovereign Immunity Bars To The Award Of Complete Relief In Title VII Cases

In the Equal Employment Opportunity Act of 1972 Congress used, if anything, even clearer language to evidence an intent to abrogate sovereign immunity

totally than the phrase "sue and be sued." Not only has it provided in the statute that an action against the federal government will be governed by precisely the same relief provisions that govern actions against private employers,[28] but it has provided specifically that the government will be liable for fees "the same as a private person."[29] It has, moreover, stated explicitly in the legislative history of the Act that federal employees will "have the full

---

28 42 U.S.C. § 2000e-16(d):

> The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder.

See Chandler v. Roudebush, 425 U.S. 840, 846-48 (1976) for the meaning of the phrase "as applicable." For the reasons stated there, the phrase cannot be construed as limiting the clear language of 2000e-5(k).

29 42 U.S.C. § 2000e-5(k), one of the provisions incorporated by reference by § 2000e-16(d).

rights available in the courts as are granted to individuals in the private sector under Title VII."[30]

Strikingly absent from the government's brief is any substantial discussion of the Act's legislative history.[31] Similarly striking is the absence of any reference whatsoever to the prior decisions of this Court discussing the history and purpose of the Act. This Court has held that § 2000e-16 provides federal employees with a "careful blend of

---

30 Sen. Rep. No. 92-415 (92d Cong., 1st Sess., 1971), reprinted in Subcommittee on Labor, Senate Commitee on Labor and Public Welfare, "Legislative History of The Equal Employment Opportunity Act of 1972" (hereinafter "Legislative History") at 425.

31 The only citation in its brief, at p. 19, to the legislative history is to the entire lengthy compendium cited supra, n. 30. The government simply asserts that it could find nothing in that substantial book that casts any light on the issue before the Court, presumedly because it could not find the magic word "interest" therein.

administrative and judicial enforcement powers"[32] intended "to accord federal employees the same right[s]"[33] enjoyed by other employees. This was accomplished by providing that 42 U.S.C. § 2000e-5(f)-(k), the provisions relating to relief for non-federal employees, govern the provision of relief to federal employees. Brown v. General Services Administration, 425 U.S. 820, (1976), squarely held that:

> Sections 706(f) through (k), 42 U.S.C. §§ 2000e-5(f) through 2000e-5(k) . . . . which are incorporated "as applicable" by § 717(d), govern such issues as venue, the appointment of attorneys, attorneys' fees, and the scope of relief.

425 U.S. at 832 (emphasis added).

---

[32] Brown v. General Services Administration, 425 U.S. 820, 833 (1976).

[33] Chandler v. Roudebush, 425 U.S. 840, 848 (1976).

Crucial to an understanding of the intent of Congress when it passed 42 U.S.C. §2000e-16 is the background of that statute and the specific, underlying problem it addressed. Existing sovereign immunity doctrine had served as a bar both to the recovery of full relief in the administrative process and to the pursuit of such relief in court.[34] Congress passed § 2000e-16 to overcome that bar entirely.

When Congress enacted Title VII of the Civil Rights Act of 1964, it did not include the United States within the definition of employer. However, it did include a proviso that employment decisions of the government were to be free of discrimination and entrusted to the

---

[34] See Schlei & Grossman, Employment Discrimination Law, Chap. 33, "Federal Employee Litigation" (2d Ed. 1983), for a summary of the history of the 1964 and 1972 Acts and of the Civil Service Reform Act of 1978 as they relate to federal employee discrimination claims.

President the power to implement that proviso.[35] Subsequently, Executive Orders 11246 and 11478 were issued along with implementing regulations enacted by the then Civil Service Commission.[36]

The regulations provided administrative procedures and certain remedies to federal employees for discrimination in employment. However, the scope of relief available was severely limited because of an opinion of the Comptroller General that back pay could be awarded for a discrimination claim only insofar as it was permitted under the Back Pay Act (5 U.S.C. § 5596(b)).[37] Thus, a federal employee who

---

35 P.L. 88-352, § 701(b).

36 5 C.F.R. Part 713 (1967). These regulations, as amended, are now found at 29 C.F.R. Part 1613.

37 Testimony of Irving Kator, Hearings Before the General Subcommittee on Labor of the House Committee On Education And Labor on H.R. 1746, March 3, 4, and 18, 1971, p. 365.

succeeded in challenging a discharge could receive the back pay he had been denied thereby, while an employee who successfully challenged the denial of a promotion on the ground of discrimination could not.[38] The underlying basis for the Comptroller General's opinion was that without an explicit waiver of sovereign immunity by Congress, the only relief available for discrimination claims was that available under existing statutory authority.

With regard to the availability of a judicial remedy, there was a split in the courts. While the Court of Claims held that there was a right to bring an action based on discrimination,[39] the Eighth

---

38 See, United States v. Testan, 424 U.S. 392 (1976), for a discussion of the distinction between discharge and promotion claims under the Back Pay Act in a case that does not involve a discrimination claim.

39 Chambers v. United States, 451 F.2d 1045 (Ct. Cl. 1971).

Circuit in Gnotta v. United States, 415 F.2d 1271 (8th Cir. 1969), held that sovereign immunity precluded such an action and that the various statutes upon which such a claim might be based did not constitute a sufficient waiver of sovereign immunity.

Thus, as this court has already held in Brown v. GSA, one of the central concerns discussed in the hearings and committee reports involving § 2000e-16 were sovereign immunity bars to relief for federal employees asserting claims of discrimination. Thus, witnesses urged that Congress must act to ensure the availability of complete relief.[40] Representatives of the Civil Service Com-

[40] See, e.g., testimony of Hon. Walter E. Fauntroy, Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare on S.2515, S.2617, and H.R. 1746, Oct. 4, 6, and 7, 1971, at p. 206.

mission, while acknowledging limitations on the relief they could grant because of the Comptroller General's ruling, attempted to assure Congress that there was no sovereign immunity bar to judicial relief.[41]

The Senate Committee, however, noted that "the testimony of the Civil Service Commission notwithstanding . . . [i]n many cases the employee must overcome a U.S. Government defense of sovereign immunity" and that "the remedial authority of the Commission and the courts has also been in doubt."[42] Thus, it was made explicit in

[41] Testimony of Irving Kator, Hearings cited supra, n.37, pp. 319-20; Testimony of Irving Kator, Hearings cited supra, n. 40, p. 296.

[42] Legislative History at 425. As noted by the government in its brief in Brown v. GSA, supra, "Ultimately, the Committees concluded that judicial review was not available at all or that access was doubtful and that some forms of relief were definitely foreclosed." Brief for Respondents in No. 74-768, p. 24.

the legislative reports that a central purpose of § 2000e-16 was specifically to remove sovereign immunity bars to relief for federal employees, both in the administrative process and in court.[43]

With regard to the administrative process, Congress specified that the Civil Service Commission (now the Equal Employment Opportunity Commission)[44] could grant back pay and all other relief necessary.[45]

---

[43] Legislative History at 425.

[44] Jurisdiction over federal equal employment opportunity matters was transferred to the EEOC by the President's Reorganization Plan No. 1 of 1978. 43 F.R. 28971 (1978).

[45] Section 2000e-16(b) provides that the Commission may enforce 2000e-16(a) "through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section . . . ." The section-by-analysis accompanying the conference report explained:

> The Civil Service Commission would be authorized to grant appropriate remedies which may include, but are not limited to, backpay for aggrieved applicants or employees. Any remedy needed to fully recompense the employee for his loss, both financial and professional, is considered appropriate under this subsection.

Legislative History at 1851. (Emphasis added.) The District Court for the District of Columbia interpreted § 2000e-16(b) as authorizing the award of attorneys' fees administratively in an employment discrimination case. Smith v. Califano, 446 F. Supp. 530 (D.D.C. 1978). Congress authorized the award of fees by the Merit Systems Protection Board in EEO cases in the Civil Service Reform Act of 1978, 5 U.S.C. § 7701(g)(2). Subsequently, both the MSPB and the EEOC adopted regulations for the award of fees in EEO cases. 5 C.F.R. § 1201.37; 29 C.F.R. § 1613.271(c).

The legislative history makes it clear that there was no intent to limit the relief available to that specified in the statute. Rather, Congress recognized the impossibility, in the context of Title VII, of predetermining all the possible types and scope of relief that might be appropriate. Thus, at the same time Congress was enacting § 2000e-16 it was expanding the language of the relief provisions of Title VII in 42 U.S.C.

§ 2000e-5(g). As held by this Court in Franks v. Bowman Transportation Company, 424 U.S. 747, 763-66 (1976), the legislative history of the amendment to § 2000e-5(g) makes it clear that the "'most complete relief possible'" was to be available, unlimited by the enumeration in the statute of certain particular remedies. 424 U.S. at 764.

When Congress provided a judicial remedy for federal employees, it seized on the simple expedient of incorporating the relief provisions that were applicable to all other employers into § 2000e-16. Thus, it first provided that federal employees could bring a civil action[46] and then made all of the relief provisions applicable to private, state, and local government employers applicable to actions brought by

[46] 42 U.S.C. § 2000e-16(c).

federal employees.[47] Again, Congress' intent to make precisely the same relief available to federal employees as is available to all other employees is clear.[48]

Thus, the clear language of the statute, the legislative history, and the entire background and purpose of the statute allow no other interpretation than that Congress intended to enact a complete waiver of sovereign immunity in cases raising claims of discrimination in employment against federal agencies. The waiver includes allowing attorneys' fees

[47] 42 U.S.C. § 2000e-16(d).

[48] The Senate Report states, "aggrieved employees . . . will also have the full rights available in the courts as are granted to individuals in the private sector under Title VII." Legislative History at 425.

on the same basis, in the same amount, and calculated in the same manner as fees against other parties.[49]

[49] The petitioners' attempt to rely on lower court decisions decided under the Equal Access to Justice Act is misplaced for a number of reasons. (1) The purpose of the EAJA is entirely different. It deals specifically with typical governmental actions and is limited to awarding fees only when the positions taken by the government were not "substantially justified." (2) The EAJA's purpose is not to encourage the bringing of litigation, but rather is to provide some measure of reimbursement to those who must defend against unjust governmental actions. (3) The EAJA limits fees to $75 per hour and thus does not purport to provide full or just compensation for expenditures of attorneys fees. Therefore, particularly with regard to the inclusion of pre-judgment interest, it has no relevance whatsoever to the calculation of a "reasonable," i.e., fully compensatory, fee. (4) Congress explicitly provided that the EAJA did not alter, limit, modify, repeal, invalidate, or supersede any other statute, including the civil rights acts, which provided for fees against the United States. P.L. 96-481, § 206. This language was inserted in the statute precisely because of concerns that the EAJA might be relied upon to restrict fee awards in civil rights cases.

Despite the evidence of the clear intent of § 2000e-16, following its enactment the government persisted in arguing that sovereign immunity limited the relief available to federal employees, including the recovery of attorneys' fees. Indeed, the government's first argument was that no fees were available against the government whatsoever because of sovereign immunity. In fact, the government made the same "fortuity" argument that it now makes at p. 20 of its brief here: that is, when Congress incorporated 42 U.S.C. § 2000e-5(k) into § 2000e-16 it really had no intent to impose on the United States liability for fees when a government employee prevailed in a Title VII action where a federal agency was the defendant.[50] The government eventually

[50] Letter from Irving Jaffe, Acting Attorney General, to Senator John V. Tunney, May 6, 1975, printed in 2 CCH Employment Practices Guide ¶5327 (1976). See Ralston,

abandoned this argument in 1975 [51] and finally, in 1977, the Attorney General of the United States officially disavowed any reliance on arguments based on sovereign immunity. He stated:

> "In a similar vein, the Department will not urge arguments that rely upon the unique role of the Federal Government. For example, the Department recognizes that the same kinds of relief should be available against the Federal Government as courts have found appropriate in private sector cases, including imposition of affirmative action plans, back pay and attorney's fees. See Copeland v. Usery, 13 EPD ¶11,434 (D.D.C. 1976); Day v. Mathews, 530 F.2d 1083 (D.C. Cir. 1976); Sperling v. United States, 515 F.2d 465 (3d Cir. 1975). Thus, while the Department might oppose particular remedies in a given case, it will not urge that different standards be applied in cases

"The Federal Government as Employer: Problems and Issues in Enforcing the Anti-Discrimination Laws", 10 Ga. L. Rev. 717, 719 n. 13 (1976).

51 Ibid.

> against the Federal Government than are applied in other cases.

Memorandum of Attorney General Griffin B. Bell for United States Attorneys and Agency General Counsel (Aug. 31, 1977), p. 2.[52]

This directive was in effect when the services at issue here were rendered and when the district court entered its award; to the knowledge of counsel for respondent, it has never been withdrawn. If the position taken in the present case constitutes a repudiation of that announced in 1977, we urge that it is in error. As we have shown, Congress intended to and in fact did confer "upon Federal employees . . . the same substantive . . . [and] procedural rights . . .

52 The memorandum was published in 2 CCH Employment Practices Guide ¶ 5046 (1977). For the convenience of the Court, the memorandum is reproduced in Appendix III to this Brief at pp. 1c-3c.

as it has conferred upon employees . . . in private industry and in state and local governments." (Ibid.) This Court should affirm that the United States has "no lesser obligations with respect to equal employment opportunities than those it seeks to impose upon private and state and local government employees." (Ibid.) The rights afforded federal employees include the recovery of attorneys' fees and back pay in their entirety, including both pre- and post-judgment interest and other necessary components of full make whole relief.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

JULIUS LeVONNE CHAMBERS
CHARLES STEPHEN RALSTON
(Counsel of Record)

99 Hudson Street,
16th Floor
New York, N.Y. 10013
(212) 219-1900

Attorneys for Respondent

APPENDIX I

Statutes Involved

42 U.S.C. § 2000e-16

(a) All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military departments as defined in section 102 of title 5, United States Code, in executive agencies as defined in section 105 of title 5, United States Code (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination

based on race, color, religion, sex, or national origin.

(b) Except as otherwise provided in this subsection, the Civil Service Commission shall have authority to enforce the provisions of subsection (a) through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Civil Service Commission shall --

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a) of

this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semi-annual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendations of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules,

regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to --

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment opportunity for the principal and operating officials of each such department, agency or unit responsible for carrying out the equal

employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Civil Service Commission shall be exercised by the Librarian of Congress.

(c) Within thirty days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection 717(a), or by the Civil Service Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding

executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Civil Service Commission on appeal from a decision or order of such department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant. (July 2, 1964, P.L. 88-352, title VII, § 717, as added Mar. 24, 1972, P.L. 92-261, § 11, 86 Stat. 111, as amended, Feb. 15, 1980, P.L. 96-191, § 8(g), 94 Stat. 34.)

28 U.S.C. § 2516(a)

Interest on a claim against the United States shall be allowed in a judgment of the United States Claims Court only under a contract or Act of Congress expressly providing for payment thereof. (Based on title 28, U.S.C., 1940 ed., § 284 and section 226 of title 3, U.S.C., 1940 ed., Money and Finance (Sept. 30, 1890, ch. 1126, § 1, 26 Stat. 537; Mar. 3, 1911, ch. 231, § 177, 36 Stat. 1141; Nov. 23, 1921, ch. 136, § 1324(b), 42 Stat. 316; June 2, 1924, ch. 234, § 1020, 43 Stat. 346; Feb. 13, 1925, ch. 229, § 3(c), 43 Stat. 939; Feb. 26, 1926, ch. 27, §§ 1117, 1200, 44 Stat. 119, 125; May 29, 1928, ch. 852, § 615(a), 45 Stat. 877; June 22, 1936, ch. 690, § 808, 49 Stat. 1746).)

APPENDIX II

Calculation of Loss of Value Through Inflation

A method for adjusting dollar amounts for the effect of inflation is set out in Hohenstein, "Subtract Inflation from Your Income, Prices and Profits," Legal Economics 35 (ABA Section on Economics of Law Practice, Summer 1978). The method sets up a formula based on the consumer price index (CPI), which uses 1967 as the base year. The following table sets out the CPI for each year through 1984.

Table[1]

Year	CPI
1967	100.0
1968	104.2
1969	109.8
1970	116.3
1971	121.3
1972	125.3
1973	133.1
1974	147.7
1975	161.2
1976	170.5
1977	181.5
1978	195.3
1979	217.7
1980	247.0
1981	272.3
1982	288.6
1983	297.4
1984	307.6

Using the example in the text, to convert 1975 dollars into their 1980 equivalent, the following ratio is used 1980 CPI/1975 CPI = 247.0/161.2 = 1.53. The $80 per hour 1975 rate is then multiplied by 1.53; $80 X 1.53 = $122.40.

---

[1] Source: Consumer Price Index for Urban Wage Earners and Clerical Workers, annual averages and changes, 1967-84. United States Department of Labor, Bureau of Labor Statistics, Monthly Labor Review. May, 1985, p. 69.

Therefore, fees awarded in 1980 would have to be calculated at $122.40 per hour simply to provide the same dollar equivalent as if the fees had been paid in 1975.

To convert the other way, i.e., from 1980 dollars to their 1975 equivalent, the converse ratio is used. 1975 CPI/1980 CPI = 161.2/247.0 = .65. Therefore, an award of $80 per hour in 1980 would be the same as if fees had been paid at a rate of $52 per hour in 1975. ($80 X .65 = $52.).

APPENDIX III

Memorandum of Attorney General Griffin B. Bell for United States Attorneys and Agency General Counsel (Aug. 31, 1977)

MEMORANDUM FOR UNITED STATES ATTORNEYS
AND AGENCY GENERAL COUNSELS

Re: Title VII Litigation

In 1972, as additional evidence of our Nation's determination to guarantee equal rights to all citizens, Congress amended Title VII of the Civil Rights Act of 1964 to provide Federal employees and applicants for Federal employment with judicially enforceable equal employment rights. The Department of Justice, of course, has an important role in the affirmative enforcement of rights under the Act, in both the private and public sectors. To effectively discharge those responsibilities, we must ensure that the Department of Justice conducts its representational functions as defense attorneys for agencies in suits under the Act in a way that will be supportive of and consistent with the Department's broader obligations to enforce equal opportunity laws. This memorandum is issued as part of what will be a continuing effort by the Department to this end.

Congress, in amending Title VII, has conferred upon Federal employees and applicants the same substantive right to be free from discrimination on the basis of race, color, sex, religion, and national origin, and the same procedural rights to judicial enforcement as it has conferred upon employees and applicants in private industry and in state and local governments. Morton v. Mancari, 417 U.S. 535 (1974); Chandler v. Roudebush, 425 U.S. 840 (1976). And, as a matter of policy, the Federal Government should be willing to assume for its own agencies no lesser obligations with respect to equal employment opportunities than those it seeks to impose upon private and state and local government employers.

In furtherance of this policy, the Department, whenever possible, will take the same position in interpreting Title VII in defense of Federal employee cases as it has taken and will take in private or state and local government employee cases. For example, where Federal employees and applicants meet the

REPLY

BRIEF

(6)

No. 85-54

In the Supreme Court of the United States

OCTOBER TERM, 1985

LIBRARY OF CONGRESS, ET AL., PETITIONERS

v.

TOMMY SHAW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

16 pp

TABLE OF AUTHORITIES

Page

Cases:

Albrecht v. *United States*, 329 U.S. 599 ..... 2, 3, 7

Blake v. *Califano*, 626 F.2d 891 ..... 6, 11

Boston Sand Co. v. *United States*, 278 U.S. 41 6

Brooks-Scanlon Corp. v. *United States*, 265 U.S. 106 3

Brown v. *GSA*, 425 U.S. 820 ..... 10, 11

Chandler v. *Roudebush*, 425 U.S. 840 10

Christiansburg Garment Co. v. *EEOC*, 434 U.S. 412 7

Copeland v. *Marshall*, 641 F.2d 880 7

Cross v. *United States Postal Service*, 733 F.2d 1327, aff'd, 733 F.2d 1332, cert. denied, No. 84-979 (Mar. 18, 1985) 4

deWeever v. *United States*, 618 F.2d 685 11

FHA v. *Burr*, 309 U.S. 242 9

Fischer v. *Adams*, 572 F.2d 406 11

Franchise Tax Board v. *United States Postal Service*, No. 83-372 (June 11, 1984) 9

General Motors Corp. v. *Devex Corp.*, 461 U.S. 648 ..... 5, 7

Lehman v. *Nakshian*, 453 U.S. 156 ..... 9, 10

Liggett & Myers Tobacco Co. v. *United States*, 274 U.S. 215 3

Page

Cases—Continued:

Loeffler v. *Carlin*, No. 84-2553 (8th Cir. Dec. 30, 1985) 4, 9

Nagy v. *United States Postal Service*, 773 F.2d 1190 9

New York Gaslight Club v. *Carey*, 447 U.S. 54 7

Phelps v. *United States*, 274 U.S. 341 3

Richerson v. *Jones*, 551 F.2d 918 11

Ruckelshaus v. *Sierra Club*, 463 U.S. 680 9

Saunders v. *Claytor*, 629 F.2d 596, cert. denied, 450 U.S. 980 ..... 6-7, 11

Seaboard Air Line R.R. Co. v. *United States*, 261 U.S. 299 3

Segar v. *Smith*, 738 F.2d 1249, cert. denied, No. 84-1200 (May 20, 1985) 11

Smyth v. *United States*, 302 U.S. 329 ..... 2, 3

Standard Oil Co. v. *United States*, 267 U.S. 76 9

Tillson v. *United States*, 100 U.S. 43 ..... 2, 3, 10

United States v. *Alcea Band*, 341 U.S. 48 ..... 2, 3, 7

United States v. *Commonwealth & Dominion Line, Ltd.*, 278 U.S. 427 ..... 2, 3

United States v. *Goltra*, 312 U.S. 203 ..... 2, 3, 7

United States v. *Louisiana*, 446 U.S. 253 2

Page

Cases—Continued:

United States v. *North American Co.*, 253 U.S. 330 ..... 2, 3, 6

United States v. *North Carolina*, 136 U.S. 211 5

United States v. *N.Y. Rayon Importing Co.*, 329 U.S. 654 ..... 2, 3, 8, 9

United States v. *Sherman*, 98 U.S. 565 6

United States v. *Thayer-West Point Hotel Co.*, 329 U.S. 585 ..... 2, 3, 7

United States v. *Verdier*, 164 U.S. 213 ..... 2, 5, 6

United States v. *Worley*, 281 U.S. 339 2

Waite v. *United States*, 282 U.S. 508 3

Constitution and statutes:

U.S. Const. Amend. V (Taking Clause) 3, 7

28 U.S.C. 2516 9

42 U.S.C. 2000e-5(k) 1, 7, 11

Miscellaneous:

Comment, *Prejudgment Interest: An Element Not to be Overlooked*, 8 Cum. L. Rev. 521 (1977) 5

Developments in the Law—Damages, 61 Harv. L. Rev. 113 (1947) 5

Note, *Interest in Judgments Against the Federal Government: The Need for Full Compensation*, 91 Yale L.J. 297 (1981) 5

Page

Miscellaneous—Continued:

4 Op. Att'y Gen. 136 (1842) 5

Recent Developments, *Prejudgment Interest as Damages: New Application of an Old Theory*, 15 Stan. L. Rev. 107 (1972) 5

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 85-54

LIBRARY OF CONGRESS, ET AL., PETITIONERS

v.

TOMMY SHAW

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Respondent has failed to challenge most of the legal propositions established in our opening brief. He barely contests, for example, our submission (Gov't Br. 11-17) that Congress must be found to have clearly and affirmatively contemplated an award of interest against the United States before the "no-interest rule" may be deemed waived. He does not deny that Congress's usual approach, when it has wished to make interest available against the government, has been to do so in terms, spelling out the applicable procedures and rates (see Gov't Br. 21-25). He does not suggest that Congress—in either the language or the legislative history of Title VII—so much as adverted to the availability of interest (see Gov't Br. 17-21). And he makes virtually no attempt to defend the analysis propounded by the court of appeals in this case: that 42 U.S.C. 2000e-5(k) is an express waiver of the government's sovereign immunity as to interest. Yet the arguments that respondent offers in the place of that thesis are uniformly unconvincing.

1. a. Respondent's principal legal contention (Br. 14-24) is that the "no-interest rule" simply does not apply to claims for *prejudgment* interest; he insists that "virtually all" of the cases cited in our opening brief relating to the operation of the rule involved post-judgment interest (Br. 22). But this simply is not so. To the contrary, virtually all of the decisions cited in our brief stand for the proposition that "no interest can be allowed upon any claim against the government *up to the time of the rendition of judgment*" (*United States* v. *Verdier*, 164 U.S. 213, 218 (1896) (emphasis added))—and many refused to award prejudgment interest despite delays prior to judgment that were far longer than the one in this case. See, *e.g.*, *United States* v. *Alcea Band* (*Tillamooks*), 341 U.S. 48, 49 (1951) (although liability accrued in 1855, prejudgment interest not allowed when judgment awarded in 1950); *United States* v. *North American Co.*, 253 U.S. 330, 335-336, 338 (1920) (interest unavailable where liability accrued 20 years prior to judgment). Accord *United States* v. *N.Y. Rayon Importing Co.*, 329 U.S. 654, 658 (1947); *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588-590 (1947); *United States* v. *Goltra*, 312 U.S. 203, 205, 207 (1941); *United States* v. *Worley*, 281 U.S. 339, 340, 343-344 (1930); *United States* v. *Commonwealth & Dominion Line, Ltd.*, 278 U.S. 427, 428 (1929); *Verdier*, 164 U.S. at 218; *Tillson* v. *United States*, 100 U.S. 43, 47 (1879). See generally *United States* v. *Louisiana*, 446 U.S. 253, 261-265 (1980); *Albrecht* v. *United States*, 329 U.S. 599, 601, 603 (1947); *Smyth* v. *United States*, 302 U.S. 329, 354 (1937).[1] Similarly, the early

[1]Respondent evidently takes the position that, because the government's liability in some of these cases was liquidated, interest on that liability would have had "the character of post-judgment interest" (Br. 18 n.10; see *id.* at 21-22). The fact that the underlying debt involves a sum certain, however, hardly converts interest on that debt for the period *prior* to the entry of judgment into post-judgment interest. In any event, many of the cases cited above involved unliquidated liabilities. See, *e.g.*, *Tillamooks*, 341 U.S. at 48; *Thayer-West Point Hotel Co.*, 329 U.S. at 587; *Goltra*, 312 U.S. at 205; *Commonwealth & Dominion Line*, 278 U.S. at 428; *North American Co.*, 253 U.S. at 332-333.

Attorneys General Opinions (see Gov't Br. 12) propounding and applying the "no-interest rule" to claims paid by Executive Departments had no occasion at all to discuss post-judgment interest.[2]

Indeed, to our knowledge, no court ever has accepted—or even discussed—the distinction between pre-and post-judgment interest advanced by respondent.[3] As the

[2]Similarly, respondent is simply incorrect in asserting (Br. 22-23) that 28 U.S.C. 2516 reaches only post-judgment interest; as this Court has explained, that statute's predecessors provided that "no interest [was] allowed on any claim up to the time of the rendition of judgment." *Goltra*, 312 U.S. at 207. See *N.Y. Rayon Importing Co.*, 329 U.S. at 661; *Tillson*, 100 U.S. at 47.

[3]Respondent relies principally on cases requiring the payment of interest as part of the just compensation due after an exercise of the government's eminent domain power (Br. 17-18, citing *Seaboard Air Line R.R.* v. *United States*, 261 U.S. 299 (1923); *Brooks-Scanlon Corp.* v. *United States*, 265 U.S. 106 (1924); *Liggett & Myers Tobacco Co.* v. *United States*, 274 U.S. 215 (1927); *Phelps* v. *United States*, 274 U.S. 341 (1927); *Albrecht* v. *United States*, 329 U.S. 599 (1947)). As the Court repeatedly has explained, however, those cases turn entirely on the nature of the Fifth Amendment's Taking Clause and have no application outside the constitutional context. See *Tillamooks*, 341 U.S. at 49; *Albrecht*, 329 U.S. at 602-605; *Smyth*, 302 U.S. at 353-354.

Respondent also relies upon *Waite* v. *United States*, 282 U.S. 508 (1931), in which prejudgment interest was awarded against the United States in a patent infringement action. But the Court's two-paragraph decision in *Waite* was not well-considered; the government did not contest its liability for interest (*ibid.*), and the Court relied principally upon inapposite Taking Clause decisions (see *id.* at 509). In these circumstances, it is doubtful that *Waite* can be reconciled with this Court's otherwise consistent application of the "no-interest rule." And *Waite* does not, in any event, adopt the distinction between pre- and post-judgment interest contended for by respondent.

decisions cited above indicate, this Court has not recognized any such dichotomy. The same is true of the courts of appeals, which uniformly have held that interest on back pay awards is unavailable to Title VII *plaintiffs* (see cases cited at Gov't Br. 20-21).[4] And it is true even of the court below, which explicitly recognized that the "no-interest rule" would be applicable here in the absence of a sufficiently clear waiver (Pet. App. 13a-14a).

b. That the courts have failed to distinguish between pre-and post-judgment interest for purposes of the "no-interest rule" is hardly surprising, for the policy and historical differences between the two forms of interest that are postulated by respondent have no basis in fact. Respondent asserts that post-judgment interest traditionally was understood to serve as a penalty for failure to make timely payment on a fixed judgment (Br. 20), while prejudgment interest instead served as "a part of the calculation of the judgment itself" (Br. 19). Because, in respondent's view, the "no-interest rule" was created in response to the principle that the government may not be penalized without its consent (Br. 21), he suggests that the rule as originally formulated did not apply to prejudgment interest.

In fact, however, the traditional view, which prevailed in the nineteenth and early twentieth centuries when the "no-interest rule" already was in full force, saw not only post-judgment interest, but also "prejudgment interest as a penalty awarded on the basis of the defendant's conduct."

[4]At the time that our opening brief was filed, five circuits—including two panels of the District of Columbia Circuit—had held interest unavailable on Title VII back pay awards against the federal government. Since then, another court of appeals has reached the same conclusion. *Loeffler* v. *Carlin*, No. 84-2553 (8th Cir. Dec. 30, 1985) (relying on *Cross* v. *United States Postal Service*, 733 F.2d 1327, aff'd by an equally divided en banc court, 733 F.2d 1332 (8th Cir. 1984), cert. denied, No. 84-979 (Mar. 18, 1985)).

General Motors Corp. v. *Devex Corp.*, 461 U.S. 648, 655-656 n. 10 (1983). See Recent Developments, *Prejudgment Interest as Damages: New Application of an Old Theory*, 15 Stan. L. Rev. 107 (1972); Comment, *Prejudgment Interest: An Element Not to be Overlooked*, 8 Cum. L. Rev. 521, 522 (1977); *Developments in the Law—Damages*, 61 Harv. L. Rev. 113, 137 (1947). See also Note, *Interest in Judgments Against the Federal Government: The Need for Full Compensation*, 91 Yale L.J. 297, 299-301 (1981).[5] There is thus no historical basis on which to distinguish between the two forms of interest. Conversely, no ground of policy exists to set pre- and post-judgment interest (or, for that matter, interest on liquidated as opposed to unliquidated claims) apart from one another; both serve to compensate a plaintiff for "the foregone use of the money" between the time of the injury and the date of payment. *General Motors Corp.*, 461 U.S. at 656.

Respondent's historical analysis is, in any event, overly simplistic. While interest often was characterized as a penalty during the nineteenth century, the "equitable principle that interest is an incident to the debt" plainly was understood at the time. 4 Op. Atty. Gen. 136, 137 (1842). And the "no-interest rule" was justified not only on the ground offered by respondent, but also "by the policy of society * * * for the protection of the public." 4 Op. Atty. Gen. at 137. See *Verdier*, 164 U.S. at 218-219; *United States* v. *North Carolina*, 136 U.S. 211, 216 (1890). As noted above (note 1), the Court accordingly has applied the "no-interest

[5]This evidently was the origin of the common law rule that prejudgment interest is available only on liquidated claims: "Because a defendant could not be expected to pay an obligation of uncertain magnitude, it was thought improper to penalize him for withholding payment pending adjudication." Note, *supra*, 91 Yale L.J. at 301 (footnote omitted). See *Developments*, *supra*, 61 Harv. L. Rev. at 137. See generally *General Motors Corp.*, 461 U.S. at 651-652 & n.5.

rule" routinely—and consistently—in cases involving prejudgment interest on both liquidated and unliquidated debts. Indeed, whatever the original justification for the rule, Congress has been aware of the rule's existence for over a century. Legislation enacted in such a setting must be interpreted with the "no-interest rule" in mind.

2. Respondent's second argument (Br. 24-35)—that the statutory purpose would be served were interest available—is premised on the proposition that the "no-interest rule" is inapplicable to claims for prejudgment interest. That a policy consideration of this sort may suffice to make interest available against private Title VII defendants, however, simply has no bearing here. The very purpose of the "no-interest rule" is to permit the government to "occupy an apparently favored position" (*Verdier*, 164 U.S. at 218-219) by protecting it from claims for interest that would prevail against private parties; the rule comes into play only when the statute at issue is of the sort that would (or does) make interest available against nongovernmental entities. See *Blake* v. *Califano*, 626 F.2d 891, 893 (D.C. Cir. 1980). Cf. *Boston Sand Co.* v. *United States*, 278 U.S. 41, 49 (1928) (in the adjustment of mutual claims, the government may obtain interest on its award while interest is unavailable to the other party) (dictum); *North American Co.*, 253 U.S. at 336 (same); *Verdier*, 164 U.S. at 218-219 (same).

Similarly, respondent may not obtain interest through the semantic device of claiming that an adjustment to compensate for delay is a necessary element of a reasonable attorneys' fee (Resp. Br. 24-25). Because the "no-interest rule" protects the government from liability for delay (see *United States* v. *Sherman*, 98 U.S. 565, 568 (1878)), any portion of a fee award that compensates for the "belated receipt of [funds]" is barred by sovereign immunity. *Saunders* v. *Claytor*, 629 F.2d 596, 598 (9th Cir. 1980), cert.

denied, 450 U.S. 980 (1981). This is a principle that routinely has been applied by the Court. The term "just compensation," for example, ordinarily is understood to involve an interest component; where "takings" in the constitutional sense are involved, the Taking Clause *requires* payment of interest. See note 3, *supra*. Pointing to the "no-interest rule," however, the Court consistently has held that interest is unavailable under statutes or contracts directing the United States to pay "just compensation" to private parties, reasoning that Congress should not be deemed by the use of general language to have waived the government's immunity against claims grounded on delay in payment. See, *e.g.*, *Tillamooks*, 341 U.S. at 49; *Albrecht*, 329 U.S. at 605; *Thayer-West Point Hotel Co.*, 329 U.S. at 586; *Goltra*, 312 U.S. at 204 n.2, 207-211.

It is worth adding that the policy concerns articulated by respondent are overstated; this is not a case in which the statutory scheme simply cannot function if interest is unavailable. The ultimate purpose of Section 2000e-5(k) is not to provide employment for attorneys, but rather to ensure that Title VII plaintiffs will be able to obtain representation and thus access to the courts. See *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980); *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 420 (1978). Compare, *e.g.*, *General Motors Corp.*, 461 U.S. at 654-655. While the payment of interest certainly would more handsomely compensate plaintiffs' lawyers, its unavailability in Title VII suits against the government evidently has not, as a practical matter, made it difficult for plaintiffs to obtain adequate representation.[6] The impact of the "no-interest

---

[6]To our knowledge, the first case even to suggest that compensation for delay might be available against the government in Title VII litigation was *Copeland* v. *Marshall*, 641 F.2d 880, 892-893 (D.C. Cir. 1980), and that suggestion has not been followed by other courts of appeals. For most of the period of its application, and in most parts of the

rule," moreover, may be minimized through the use of other devices, such as interim awards of the undisputed portions of attorneys' fees (see Resp. Br. 5, 33), that do not run afoul of the government's sovereign immunity. But however that may be, respondent's policy arguments are, in the final analysis, simply offered in the wrong forum: "[T]he immunity of the United States from liability for interest is not to be waived by policy arguments of this nature. Courts lack the power to award interest against the United States on the basis of what they think is or is not sound policy." *N.Y. Rayon Importing Co.*, 329 U.S. at 659.

3. Respondent finally maintains that Congress did in fact intend to waive the "no-interest rule" in Title VII suits against the federal government (Br. 39-60). This contention evidently is grounded on two propositions: that sovereign immunity is now a disfavored doctrine, so that strict application of the rule is inappropriate (Br. 39-40); and that Congress, in manifesting an intent to make equivalent relief available to federal and to private sector Title VII plaintiffs, spoke with sufficient clarity to overcome the rule (Br. 43-60). Neither of these propositions has merit.

a. Respondent's assertion that purported waivers of sovereign immunity no longer are to be judged under the traditional standard is insupportable. The Court has recently—and repeatedly—reaffirmed the principle that "[w]aivers of immunity must be 'construed strictly in favor of the sovereign,' *McMahon* v. *United States*, 342 U.S. 25, 27 (1951), and not 'enlarge[d] . . . beyond what the language

---

country, interest accordingly has not been available on Title VII attorneys' fees against the federal government. Moreover, for the beginning practitioner or small firm attorney identified by respondent as "the typical civil rights lawyer" (Br. 29), factors wholly independent of the "no-interest rule"—such as the contingent nature of the fees awarded under Title VII and the likelihood that the lawyer will have no steady stream of income (Br. 29-31)—are likely to create considerably greater practical difficulties than will the unavailability of interest.

requires,' *Eastern Transportation Co.* v. *United States*, 272 U.S. 675, 686 (1927)." *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 685-686 (1983). See *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1931). *Franchise Tax Board* v. *United States Postal Service*, No. 83-372 (June 11, 1984), upon which respondent relies, did not signal a break with this precedent; that decision is simply the most recent in a line of cases holding that, " 'when Congress launche[s] a governmental [entity] into the commercial world and endow[s] it with authority to "sue or be sued," that agency is not less amenable to judicial process than a private enterprise under like circumstances would be.' " Slip op. 5, quoting *FHA* v. *Burr*, 309 U.S. 242, 245 (1940). See *Nagy* v. *United States Postal Service*, 773 F.2d 1190, 1192 (11th Cir. 1985).[7]

b. Viewed under the proper standard, respondent's argument fails to show the manifest congressional intent necessary to overcome the "no-interest rule." As we explained in our opening brief (at 13-14), a waiver of the rule must be express; indeed, under the predecessor to 28 U.S.C. 2516, which codifies the traditional "no-interest rule," the Court has held that even "an intent on the part of the framers of a statute or contract to permit the recovery of interest" does *not* "suffice where the intent is not translated into affirmative statutory or contractual terms." *N.Y. Rayon Importing Co.*, 329 U.S. at 659. Yet respondent's lengthy recitation of

---

[7]Similarly, as we explained in our opening brief (at 17 n.8), *Standard Oil Co.* v. *United States*, 267 U.S. 76 (1925) (cited by respondent at Br. 41), stands only for the proposition that the "no-interest rule" may be inapplicable to claims against a federal instrumentality operating as a commercial enterprise. See Pet. App. 49a n.8 (Ginsburg, J., dissenting). Indeed, it is unsettled whether even the Postal Service's "sue or be sued" clause suffices to overcome the "no-interest rule" in suits against the Service. Compare *Nagy*, 773 F.2d at 1192-1193, with *Loeffler* v. *Carlin*, No. 84-2553 (8th Cir. Dec. 30, 1985), slip op. 9 & n.3.

Title VII's legislative history fails to divulge any evidence that Congress ever considered the interest question, let alone formed—or expressed—an affirmative desire to make interest available.[8]

To be sure, the language and legislative history of the Equal Employment Opportunity Act of 1972 demonstrate Congress's plain intent to open courthouse doors to federal-employee Title VII plaintiffs, thus permitting them to obtain the same substantive relief from discrimination as their private sector counterparts. See generally *Brown* v. *GSA*, 425 U.S. 820, 827-828 (1976); *id.* at 836 & n.2 (Stevens, J., dissenting); *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976). But the "no-interest rule" applies even to remedial statutes that are intended to provide "just compensation" (see page 7, *supra*), or the "amount equitably due" (*Tillson*, 100 U.S. at 46), or " 'any * * * equitable relief * * * the court deems appropriate' " (*Blake*, 626 F.2d at 893 (citation and footnote omitted))—although identical language makes private defendants liable for interest (see Gov't Br. 15). And Title VII, despite its remedial ends, must be read against the background of the government's sovereign immunity (see *Brown*, 425 U.S. at 833; cf. *Nakshian*, 453 U.S. at 163); for that reason, the courts of appeals uniformly have held that Title VII plaintiffs may not obtain interest on back pay awards against the government.

[8]Although respondent mentions the language of Section 2000e-5(k) in passing (Br. 44), he does not suggest—as did the court below—that the language amounts to an express waiver of the "no-interest rule." In fact, as we explained in our opening brief (at 19-20), the statute's "same as a private person" proviso represented a threshold waiver of the government's immunity against fee awards in its role as a Title VII *plaintiff*, rather than an affirmative decision to waive the "no-interest rule." Although respondent challenges the persuasiveness of this statutory analysis as applied to support other arguments in other cases (Br. 57), he fails even to suggest why it should not be dispositive here.

Because it is indisputable that Congress did not affirmatively contemplate an award of interest against the government under Section 2000e-5(k), the same conclusion is applicable here.[9]

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

CHARLES FRIED
Solicitor General

FEBRUARY 1986

[9]Despite respondent's assertion to the contrary (Br. 58-59), this position does not represent a departure from the Justice Department's prior views. The Attorney General's memorandum cited by respondent indicated that the same standards should be applied, and the same types of relief should be available, in federal and private sector Title VII suits. It did not indicate, however, that every element of such relief must be identical in the two categories of cases; indeed, in the very year in which the memorandum was issued—and in the years immediately following—the government contended in the courts that interest should not be available to Title VII plaintiffs. See *Richerson* v. *Jones*, 551 F.2d 918, 925 (3d Cir. 1977); *Fischer* v. *Adams*, 572 F.2d 406, 411 (1st Cir. 1978); *deWeever* v. *United States*, 618 F.2d 685, 686 (10th Cir. 1980); *Blake*, 626 F.2d at 894 (1980); *Saunders* v. *Claytor*, 629 F.2d at 598 (1980); *Segar* v. *Smith*, 738 F.2d 1249, 1296 (D.C. Cir. 1984), cert. denied, No. 84-1200 (May 20, 1985).